LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 20 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 933

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

GEORGE HETENYI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Office & P. O. Address
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General
MICHAEL H. RAUCH
BRENDA SOLOFF
Deputy Assistant Attorneys General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	5
1. The decision below is directly in conflict with §§ 464 and 544 of the New York Code of Criminal Procedure and the decisions of the New York Court of Appeals	5
2. The decision below is in conflict with the decisions of this Court	6
3. The finding of prejudice by the Court of Appeals, resting as it does on a theory of compromise verdicts, conflicts with New York law and the applicable decisions of this Court. In addition, the Court of Appeals, in this habeas corpus case, utilized a standard for determining prejudice which has heretofore been applied by this Court only in direct review cases	10
4. The new rule of law formulated by the Court below was applied retroactively on collateral attack in a manner inconsistent with the decision of this Court in *Linkletter* v. *Walker*	12
5. The issues presented by this case are of general importance	13
Conclusion	15
Appendix A	1a
Appendix B	5a
Appendix C	49a

Cases Cited

PAGE

Abbate v. United States, 359 U. S. 187 9

Adams v. United States *ex rel.* McCann, 317 U. S. 269 10

Bartkus v. Illinois, 359 U. S. 121 7

Blanton v. Commonwealth, 320 S. W. 2d 626 (Ky.) .. 13

Brantley v. State of Georgia, 132 Ga. 573, 64 S. E. 676, *affirmed* 217 U. S. 284 .....2, 6, 7, 12, 13

Brock v. North Carolina, 344 U. S. 423 8

Ciucci v. Illinois, 356 U. S. 571 9

Delli Paoli v. United States, 352 U. S. 232 11

Downum v. United States, 372 U. S. 734 8

Dreyer v. Illinois, 187 U. S. 71 6

Fay v. Noia, 372 U. S. 391 7

Gibson v. Somers, 31 Nev. 531, 103 P. 1073 13

Gideon v. Wainwright, 372 U. S. 335 8

Gori v. United States, 367 U. S. 364 9

Green v. United States, 355 U. S. 184 .....2, 3, 6, 7, 11, 12

Griffin v. Illinois, 351 U. S. 12 14

Hoag v. New Jersey, 356 U. S. 474 ..... 8, 9

Hurtado v. California, 110 U. S. 516 8

Jackson v. Denno, 378 U. S. 368 8

Jones v. State, 144 Miss. 52, 109 So. 265, leave to appeal in forma pauperis denied, 273 U. S. 639 .. 13

Kring v. Missouri, 107 U. S. 221 ..... 6, 7

Linkletter v. Walker, 381 U. S. 618 12

Malloy v. Hogan, 378 U. S. 1 8

Maxwell v. Dow, 176 U. S. 581 8

McKane v. Durston, 153 U. S. 684 14

PAGE

Opper v. United States, 348 U. S. 84 11

Palko v. Connecticut, 302 U. S. 319 .....2, 7, 12

Pembrook v. State, 119 Neb. 417, 229 N. W. 271 13

People v. Dowling, 84 N. Y. 478 5

People v. Ercole, 4 N. Y. 2d 617, 152 N. E. 2d 77 5

People v. Fiorillo, 16 N. Y. 2d 678, 209 N. E. 2d 290 .. 5

People v. Hetenyi, 277 App. Div. 310, 98 N.Y.S. 2d 990 (4th Dept.), *affirmed* 301 N. Y. 757, 95 N. E. 2d 819 3

People v. Hetenyi, 304 N. Y. 80, 106 N. E. 2d 20 4

People v. Hetenyi, 282 App. Div. 1008, 125 N.Y.S. 2d 689 (4th Dept.) 4

People v. McGrath, 202 N. Y. 445, 96 N. E. 92 5

People v. Palmer, 109 N. Y. 413, 17 N. E. 213 5

People ex rel. Hetenyi v. Johnston, 10 App. Div. 2d 121, 198 N.Y.S. 2d 18, *motion for reargument denied,* 12 App. Div. 2d 574, 209 N.Y.S. 2d 287 (3rd Dept.), *leave to appeal denied,* 8 N. Y. 2d 706 4

Pointer v. Texas, 380 U. S. 400 8

Sealfon v. United States, 332 U. S. 575 8

State v. Beard, 334 Mo. 909, 68 S. W. 2d 698 13

State v. Bradley, 67 Vt. 465, 32 Atl. 238 14

State v. Correll, 229 N. C. 640, 50 S. E. 2d 717, *cert. denied* 336 U. S. 969 13

State v. Gillis, 73 S. C. 318, 53 S. E. 487 13

State v. Kessler, 15 Utah 142, 49 P. 293 14

State v. McCord, 8 Kan. 232, 12 Am. Rep. 469 13

State v. Palko, 122 Conn. 529, 191 Atl. 320, *affirmed* 302 U. S. 319 13

State v. Robinson, 100 Ohio App. 466, 137 N. E. 2d 141 13

PAGE

State v. Thomas, 88 Ariz. 269, 356 P. 2d 20 13

State *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N. E. 808 13

Stroud v. United States, 251 U. S. 15 9

Tateo v. United States, 377 U. S. 463 ..... 9, 11

Trono v. United States, 199 U. S. 521 ..... 6, 12

United States v. Ball, 163 U. S. 662 ..... 9, 11

United States *ex rel.* Hetenyi v. Wilkins, 227 F. Supp. 460 (W.D.N.Y.), *reversed*, 348 F. 2d 844 (2d Cir.), *rehearing in banc denied*, December 2, 1965 1

Wade v. Hunter, 336 U. S. 684 8

Walker v. Sauvinet, 92 U. S. 90 8

Watson v. State, 26 Okla. Crim. 377, 224 P. 368 14

Young v. People, 54 Colo. 293, 130 P. 1011 13

STATUTES CITED

N. Y. Code of Criminal Procedure, § 464 ..... 5, 6

N. Y. Code of Criminal Procedure, § 544 ..... 5, 6

N. Y. Penal Law, § 30 11

N. Y. Penal Law, § 1044 3

N. Y. Penal Law, § 1046 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

GEORGE HETENYI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Warden of Attica State Prison, Attica, New York, where respondent is presently incarcerated,* prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States ex rel. George Hetenyi* v. *Wilkins* (judgment entered July 13, 1965; motion for rehearing in banc denied December 2, 1965).

Citations to Opinions Below

The opinion of the District Court denying the respondent's application for a writ of habeas corpus is contained

* During the pendency of this case Walter H. Wilkins has been replaced as Warden of Attica State Prison by Vincent R. Mancusi. This change is reflected in the caption.

in Appendix "A" and is reported at 227 F. Supp. 460 (W.D.N.Y.). The opinion of the United States Court of Appeals for the Second Circuit is contained in Appendix "B" and is reported at 348 F. 2d 844.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 13, 1965. A timely motion for rehearing *in banc* was denied (5-3) by that Court on December 2, 1965 (Appendix "C").

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. When a defendant in a state criminal action, having been convicted by verdict of a jury of the crime of murder in the second degree under an indictment charging murder in the first degree, secures a new trial on appeal in the state courts, does the due process clause of the Fourteenth Amendment prohibit a retrial on the entire original indictment, where this procedure is required by state statutory provisions as interpreted by the highest court of the state?

2. Assuming *arguendo* that *Palko* v. *Connecticut*, 302 U. S. 319, and *Brantley* v. *Georgia*, 217 U. S. 284, are to be overruled and the rule of *Green* v. *United States*, 355 U. S. 184, applied directly to state court trials even in situations where retrial results in conviction of a crime for which the accused was validly in jeopardy, should such a decision be made retrospectively on federal habeas corpus, where the judgment of conviction under review was valid at the time it became final under the due process clause as then interpreted by this Court and where the purposes of the prohibition against placing an accused twice

in jeopardy would not be served by applying the rule of *Green* v. *United States* retrospectively?

3. Should a state court judgment of conviction be set aside by a federal habeas corpus court on grounds of former jeopardy, where the habeas corpus applicant was, on retrial, convicted of a crime for which he was validly in jeopardy under any view of the Constitution and where the only rationale for concluding that the habeas corpus applicant was prejudiced is to assume that the jury did not follow its instructions on retrial, an assumption which, if consistently applied to the first trial, nullifies any theory of former jeopardy?

Statement of the Case

The respondent was indicted for murder in the first degree and convicted, after a trial by jury, in the County Court, Monroe County, New York, of murder in the second degree.* He was sentenced on January 16, 1950, to state prison for a minimum of fifty years and a maximum of life. On appeal, this judgment was reversed and a new trial ordered because of errors in the charge to the jury and improper admission of certain evidence. *People* v. *Hetenyi*, 277 App. Div. 310, 98 N.Y.S. 2d 990 (4th Dept.). The New York Court of Appeals affirmed the judgment of the Appellate Division without opinion. *People* v. *Hetenyi*, 301 N. Y. 757, 95 N. E. 2d 819.

On retrial upon the original indictment, the respondent was convicted, after a trial by jury in Monroe County, of

---

* In New York, murder in the first degree is defined as: "The killing of a human being . . . when committed . . . from a deliberate and premeditated design to effect the death of the person killed . . ." N. Y. Penal Law § 1044. Murder in the second degree is defined as "Such killing of a human being . . . when committed with a design to effect the death of the person killed, . . . but without deliberation and premeditation." N. Y. Penal Law § 1046.

murder in the first degree and sentenced on May 29, 1951, to be executed. On direct appeal to the New York Court of Appeals, this judgment was reversed and a new trial ordered because of inflammatory, prejudicial remarks by the prosecutor on summation. *People* v. *Hetenyi*, 304 N. Y. 80, 106 N. E. 2d 20.

The respondent was tried again upon the same indictment in March, 1953, after having obtained a change of venue to Onondaga County, New York. He was convicted, after a trial by jury, of murder in the second degree and sentenced on March 30, 1953, to state prison for a minimum of forty years and a maximum of life. On appeal, this judgment was affirmed. *People* v. *Hetenyi*, 282 App. Div. 1008, 125 N.Y.S. 2d 689 (4th Dept.). Leave to appeal to the New York Court of Appeals was denied.

Thereafter, the respondent sought a writ of habeas corpus in the New York courts, asserting that he had been unconstitutionally placed twice in jeopardy when he was retried for murder in the first degree after he had been found guilty only of murder in the second degree at his first trial. This application was denied by an order dated February 18, 1959. On appeal, this order was unanimously affirmed. *People ex rel. Hetenyi* v. *Johnston*, 10 App. Div. 2d 121, 198 N.Y.S. 2d 18, *motion for reargument denied*, 12 App. Div. 2d 574, 209 N.Y.S. 2d 287 (3rd Dept.), *leave to appeal denied*, 8 N. Y. 2d 706.

Subsequently, respondent applied for a writ of habeas corpus in the federal courts. The United States District Court for the Western District of New York held that, even if respondent had been convicted of murder in the first degree at his last trial, "he would not be in custody in violation of any federally secured right" (3a).* The Court also concluded that since respondent was convicted

---

*Numbers in parentheses followed by the letter "a" refer to pages in the Appendices to this Petition.

of second degree murder at his trial, "the procedure complained of has not resulted in any hardship to the relator" (3a). Accordingly, the writ of habeas corpus was denied.

On appeal, the Court of Appeals for the Second Circuit reversed and held that, insofar as New York Code of Criminal Procedure §§ 464 and 544 authorized a retrial on the entire indictment after reversal of a conviction for a lesser included offense, they were in conflict with the due process clause of the Fourteenth Amendment (39a). The Court of Appeals also held that the writ of habeas corpus should issue notwithstanding the fact that the reprosecution resulted in a conviction of a crime for which the accused was validly in jeopardy since there was a reasonable possibility that he had been prejudiced by the inclusion of the greater charge in the indictment (40a).

Reasons for Granting the Writ

1. The decision below is directly in conflict with §§ 464 and 544 of the New York Code of Criminal Procedure and the decisions of the New York Court of Appeals.

The New York Court of Appeals has on many occasions held that, where a conviction is reversed on appeal, a new trial may be had on the entire indictment. *People* v. *Fiorillo*, 16 N. Y. 2d 678, 209 N. E. 2d 290; *People* v. *Ercole*, 4 N. Y. 2d 617, 152 N. E. 2d 77; *People* v. *McGrath*, 202 N. Y. 445, 96 N. E. 92; *People* v. *Palmer*, 109 N. Y. 413, 17 N. E. 213. This rule derives from N. Y. Code of Criminal Procedure § 464 which provides that, "The granting of a new trial places the parties in the same position as if no trial had been had" and N. Y. Code of Criminal Procedure § 544 which provides that, "When a new trial is ordered, it shall proceed in all respects as if no trial had been had". These statutes were passed in their present form on June 15, 1881, only three months after the decision of the New York Court of Appeals in *People* v. *Dowling*, 84 N. Y. 478, which implied that, after

reversal of a conviction, a new trial could be had only as to the charge of which the defendant was found guilty at the first trial.

The Court below explicitly held that, "to the extent that sections 464 and 544 of the N. Y. Code of Criminal Procedure authorize such a reprosecution [of Hetenyi], they are inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution" (39a). Thus the decision below, reversing the District Court, is irreconcilably in conflict with both the New York statutes and the decisional law of the highest court of the State of New York and should be reviewed by this Court.

2. The decision below is in conflict with the decisions of this Court.

This Court long ago concluded that the due process clause of the Fourteenth Amendment does not prohibit a retrial for a greater crime after reversal of a conviction for a lesser included crime. *Kring* v. *Missouri*, 107 U. S. 221. After stating in *Dreyer* v. *Illinois*, 187 U. S. 71, that the double jeopardy content of the Fourteenth Amendment was still an open question, the conclusion of *Kring* was made the specific holding of this Court in *Brantley* v. *Georgia*, 217 U. S. 284. This conclusion was the same under the Fifth Amendment for many years. *Trono* v. *United States*, 199 U. S. 521. In *Green* v. *United States*, 355 U. S. 184, this Court declined to follow the *Trono* rule for federal trials and specifically distinguished *Brantley* and *Kring* solely on the ground that they involved state trials. 355 U. S. at 194-95, n. 15. This Court has never repudiated the *Brantley* rule with respect to trials in State courts.

The Court below nevertheless disregarded the decisions in *Brantley* and *Kring* and reached a result directly in conflict with them, stating that it "would decline to follow them in applying the fundamental fairness standard, not

merely because of their half century antiquity, but because we would not be faithful to the evolution of our societal values if we reached any other conclusion" (38a-39a). A Circuit Court decision which is concededly in direct conflict with decisions of this Court should not be permitted to stand in the absence of review by this Court.

In concluding that the New York procedure violated fundamental fairness within the meaning of the due process clause, the decision of the Court below also conflicts with the decision of this Court in *Palko* v. *Connecticut*, 302 U. S. 319, in which it was held that the due process clause does not prohibit an appeal by a state after conviction of a lesser included crime and a retrial for the greater crime. The Court below attempted to distinguish *Palko* on the ground that it simply permits a state to appeal in situations where errors prejudicial to the state had been committed at the trial. If anything, this distinction presents an even stronger case for holding that due process was violated in *Palko* than in the instant case. (See dissenting opinion below, 47a.) In any event, the decision in *Palko* is explicit authority for a retrial for a greater crime after reversal of a conviction for a lesser crime since that is precisely what happened in *Palko*. Indeed, this Court apparently considered the holding in *Palko* to be indistinguishable from the holdings in *Brantley* and *Kring*. See *Green* v. *United States*, 355 U. S. at 194-95, n. 15. See also, *Fay* v. *Noia*, 372 U. S. 391 at 440, where this Court recognized the power of New York to retry an accused after a reversal.

A crucial element in the decision of the Court below is an anticipation that the specific result of *Green* v. *United States* will be "incorporated" by this Court into the due process clause of the Fourteenth Amendment and thereby be made directly applicable to State trials. This Court has specifically declined to overrule *Palko* and extend *Green* beyond its specific applicability to federal criminal trials. See, *e.g.*, *Bartkus* v. *Illinois*, 359 U. S. 121;

Hoag v. *New Jersey*, 356 U. S. 474. Indeed, this Court has observed that *Palko* "refused to hold that the Fourteenth Amendment made the double jeopardy provision of the Fifth Amendment obligatory on the States." *Gideon* v. *Wainright*, 372 U. S. 335, 342 (1963). In addition, this Court has explicitly approved several state court practices under the due process clause which have been forbidden to the federal government under the Fifth Amendment. *Compare Brock* v. *North Carolina*, 344 U. S. 423, *with Downum* v. *United States*, 372 U. S. 734 (retrial after jury discharged without defendant's consent) and *Hoag* v. *New Jersey*, *supra*, *with Sealfon* v. *United States*, 332 U. S. 575 (applicability of collateral estoppel). Whether *Palko* should now be overruled and the *Green* rule applied directly to state proceedings is a decision which should be made only by this Court.

It should be emphasized that prior decisions of this Court do *not* necessarily command either that such "incorporation" has already occurred or that it must now occur. In *Gideon* this Court concluded that those provisions of the Bill of Rights which are "fundamental and essential to a fair trial" should be made obligatory on the states through the Fourteenth Amendment. 372 U. S. at 342. Thus, those guarantees of the Bill of Rights which seek to insure that a defendant has a fair opportunity at trial to litigate the issue of his guilt or innocence have been made obligatory on the states, *e.g.*, *Gideon* v. *Wainwright*, *supra* (right to counsel); *Malloy* v. *Hogan*, 378 U. S. 1 (privilege against self-incrimination); *Pointer* v. *Texas*, 380 U. S. 400 (right of confrontation of witnesses). *Cf.*, *Jackson* v. *Denno*, 378 U. S. 368. In situations where trial fairness is not involved, other guarantees of the Bill of Rights have not been held to be obligatory on the states. *Hurtado* v. *California*, 110 U. S. 516 (grand jury indictment); *Maxwell* v. *Dow*, 176 U. S. 581 (criminal jury trial); *Walker* v. *Sauvinet*, 92 U. S. 90 (civil jury trial).

In *Tateo* v. *United States*, 377 U. S. 463, this Court declined to give a strict interpretation to the double jeopardy clause of the Fifth Amendment and emphasized that the question of when a retrial is permitted must necessarily be resolved by a balancing of the rights of a defendant against principles relating to the sound administration of criminal justice. 377 U. S. at 466. This approach is inconsistent with any notion that double jeopardy is in any way related to trial fairness. Even in Fifth Amendment cases, technical jeopardy has not been the controlling factor but this Court has instead focused upon whether or not the jeopardy is the kind of double jeopardy that is constitutionally prohibited. See, *e.g.*, *Gori* v. *United States*, 367 U. S. 364; *Abbate* v. *United States*, 359 U. S. 187; *Wade* v. *Hunter*, 336 U. S. 684; *Stroud* v. *United States*, 251 U. S. 15; *United States* v. *Ball*, 163 U. S. 662.

By asserting that "a reprosecution by a state, simply because it [is] a reprosecution, [can] violate a fundamental precept of justice" (15a), the decision below thus calls into question all those decisions of this Court which have refused to find unconstitutional double jeopardy even in Fifth Amendment cases. See also, *Ciucci* v. *Illinois*, 356 U. S. 571 and *Hoag* v. *New Jersey*, *supra*, in which the states were permitted to engage in multiple prosecutions arising out of the same act solely for the purpose of obtaining the highest possible verdict and punishment. The New York procedure simply seeks to obtain a trial free from reversible error. (In New York, the People may not appeal.) When measured against the prior decisions of this Court, the decision below that the New York procedure was fundamentally unfair cannot stand since any possible claim of harassment or vexatious prosecution is substantially weaker in the instant case than in other Fourteenth Amendment cases in which this Court has refused to find a violation of due process.

3. The finding of prejudice by the Court of Appeals, resting as it does on a theory of compromise verdicts, conflicts with New York law and the applicable decisions of this Court. In addition, the Court of Appeals, in this habeas corpus case, utilized a standard for determining prejudice which has heretofore been applied by this Court only in direct review cases.

Although respondent was tried on an indictment for murder in the first degree, he presently stands convicted only of murder in the second degree. The Court of Appeals acknowledged a "conceptual difficulty" (40a) in finding that New York State was without power to convict respondent of murder in the second degree since it clearly was empowered to prosecute him for that charge. The Court below nevertheless held that Hetenyi's right to due process of law was violated because "(1) there was a reasonable possibility that the conduct of the trial and the deliberation of the jury were affected by the fact that Hetenyi was indicted, prosecuted and charged with first degree murder and (2) the State was constitutionally forbidden to prosecute him for first degree murder following the completion of the first trial" (40a).

This "reasonable possibility" standard employed by the Court of Appeals is inapplicable to habeas corpus cases and, indeed, the cases cited by the Court in support of that standard are all direct review cases. The correct standard, as enunciated by this Court, is that in order to secure relief on habeas corpus the petitioner has the burden of establishing prejudice as a "demonstrable reality." *Adams v. United States ex rel. McCann*, 317 U. S. 269, 281. The Court of Appeals nevertheless held respondents' conviction unconstitutional because the mere presentation to the jury of the charge of first degree murder raised a reasonable possibility of prejudice, since it was possible that the verdict was a compromise verdict and that a lesser charge might have resulted in a compromise more favorable to respondent.

In any event, whatever standard of prejudice is employed, a compromise verdict is impossible under New York law since N. Y. Penal Law § 30 requires that "whenever a crime is distinguished into degrees, the jury, if they convict the prisoner, must find the degree of the crime of which he is guilty." Certainly if New York, by statute, precludes compromise verdicts then there is not even a "reasonable possibility" that the verdict at respondent's trial was a compromise verdict. The finding of a violation of due process based on such a possibility rejects the principle established by this Court that juries must be presumed to follow their instructions. *Delli Paoli* v. *United States*, 352 U. S. 232; *Opper* v. *United States*, 348 U. S. 84.

Moreover the *Green* case itself rests not on any theory of compromise verdicts, but squarely on the "legitimate" assumption (355 U. S. at 191) that a conviction of a lesser crime implies an acquittal of any greater crime charged in the indictment. It was this implied acquittal which formed the basis of the decision of this Court that Green was improperly convicted for the greater charge at his subsequent trial.* If no such acquittal had been implied, there could be no constitutional objection to a retrial on the greater charge. See, *e.g.*, *United States* v. *Ball*, *supra*; *Tateo* v. *United States*, *supra*.

Only by disregarding the analysis employed by this Court in *Green* was the Court below able to reach its result. Had the Court below followed the reasoning in *Green*, then clearly no prejudice can have resulted even as a reasonable possibility since silence on the first degree murder count must be read as an acquittal on that count at both the first and third trials. And, if the jury in fact acquitted respondent of first degree murder at the third trial then no

---

* If the Court below is correct in rejecting this assumption of the *Green* case, then the rationale of that case is seriously undermined and its authority even under the Fifth Amendment becomes questionable.

prejudice can be said to have resulted from his having been charged with that crime. If New York law and the *Green* rationale are rejected, then the respondent, never having been acquitted of first degree murder, was properly retried for that crime.

4. The new rule of law formulated by the Court below was applied retroactively on collateral attack in a manner inconsistent with the decision of this Court in *Linkletter* v. *Walker*.

The trials in the instant case took place in December, 1949, April-May, 1951 and March, 1953. *Green* v. *United States, supra*, was decided by this Court on December 16, 1957, approximately four years subsequent to the affirmance of Hetenyi's conviction by the Appellate Division of the New York Supreme Court, 282 App. Div. 1008, 125 N.Y.S. 2d 689 (4th Dept. 1953). Thus, at the time the judgment of conviction pursuant to which Hetenyi is now being detailed became final, there was no question about the validity of the New York procedure permitting retrial for the greater offense. Such a retrial was permissible even in the federal courts under *Trono* v. *United States, supra*, and whatever doubt might exist with respect to the present authority of *Brantley* and *Palko*, no such doubt was entertained in 1953. The habeas corpus application thus raised serious questions concerning retroactive application of new decisional rules to judgments which became final prior to these new rules, even assuming that this Court were now to overrule *Palko* and apply *Green* directly to state trials.

This Court has recently held that "the Constitution neither prohibits nor requires retrospective effect" and that, where retrospective application of new decisional law is at issue, this Court "must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation". *Linkletter* v. *Walker*, 381 U. S. 618, 629. This type

of analysis was followed, at best, in a cursory fashion by the Court below which simply concluded that habeas corpus (which necessarily applies retrospectively to final judgments) should lie despite the fact that it would not prevent most of the evils against which the double jeopardy prohibition is directed. Even assuming the Court below was correct in its conclusion that the *Green* rule should now be applied to state trials, this Court should decide whether such application should be made retrospectively on habeas corpus.

5. The issues presented by this case are of general importance.

New York is not alone in permitting a retrial on the entire original indictment after reversal of a conviction for a lesser included offense. Of the states which have passed upon the question, seventeen have reached the same conclusion as New York, a conclusion which the Court below holds is violative of the due process clause: Arizona: *State* v. *Thomas*, 88 Ariz. 269, 356 P. 2d 20; Colorado: *Young* v. *People*, 54 Colo. 293, 130 P. 1011; Connecticut: *State* v. *Palko*, 122 Conn. 529, 191 Atl. 320, *affirmed* 302 U. S. 319; Georgia: *Brantley* v. *State*, 132 Ga. 573, 64 S. E. 676, *affirmed*, 217 U. S. 284; Indiana: *State ex rel. Lopez* v. *Killigrew*, 202 Ind. 397, 174 N. E. 808; Kansas: *State* v. *McCord*, 8 Kan. 232, 12 Am. Rep. 469; Kentucky: *Blanton* v. *Commonwealth*, 320 S. W. 2d 626 (Ky.); Mississippi: *Jones* v. *State*, 144 Miss. 52, 109 So. 265, motion for leave to proceed in forma pauperis denied for want of a substantial federal question, 273 U. S. 639; Missouri: *State* v. *Beard*, 334 Mo. 909, 68 S. W. 2d 698; Nebraska: *Pembrook* v. *State*, 119 Neb. 417, 229 N. W. 271; Nevada: *Gibson* v. *Somers*, 31 Nev. 531, 103 P. 1073; North Carolina: *State* v. *Correll*, 229 N. C. 640, 50 S. E. 2d 717, *cert. denied* 336 U. S. 969; Ohio: *State* v. *Robinson*, 100 Ohio App. 466, 137 N. E. 2d 141; Oklahoma: *Watson* v. *State*, 26 Okla. Crim. 377, 224 P. 368; South Carolina: *State* v. *Gillis*, 73 S. C.

318, 53 S. E. 487; Utah: *State* v. *Kessler*, 15 Utah 142, 49 P. 293; Vermont: *State* v. *Bradley*, 67 Vt. 465, 32 Atl. 238. Thus, in addition to the important questions of federal law and practice (see Points 2-4 above), the resolution of these questions would have an impact far beyond its effect on the New York procedure as it relates to Hetenyi.

The general significance of this case beyond the confines of New York practice alone is also emphasized by the fact that the other states in the Second Circuit, Connecticut and Vermont, both are among those states which permit retrials under the circumstances of this case. Moreover, it is significant that six of the above listed states (Arizona, Kentucky, Nevada, Ohio, Oklahoma and Utah), like New York, base their conclusions at least in part upon statutes which provide that the granting of a new trial places the parties in the same position as if no trial had ever been had. For those states, as for New York, this case is of great importance since it involves the power of a state to legislate the conditions upon which it permits appeals in criminal cases in view of the long established rule that due process of law does not require that a state grant such review at all. *McKane* v. *Durston*, 153 U. S. 684, 687-88; *Griffin* v. *Illinois*, 351 U. S. 12.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, January 17, 1966.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL H. RAUCH
BRENDA SOLOFF
Deputy Assistant Attorneys General
of Counsel.

APPENDIX A

UNITED STATES of America ex rel.
George HETENYI, Relator,

v.

Walter H. WILKINS, Warden, Attica
State Prison, Respondent.

Civ. No. 10829.

United States District Court
W. D. New York.

March 13, 1964.

HENDERSON, District Judge.

Relator, a state prisoner, has applied for a writ of habeas corpus claiming he is presently in custody in violation of his constitutional rights.

In an indictment returned by the Monroe County Court on May 19, 1949, Hetenyi was charged with the crime of Murder in the First Degree. Tried in January of 1950 he was found guilty of murder in the second degree and sentenced to from fifty years to life. On appeal, the Appellate Division of the Supreme Court, Fourth Department, reversed and a new trial was granted.[1] The action of the Appellate Division was subsequently affirmed.[2]

On retrial Hetenyi was convicted of murder in the first degree, but on direct appeal this conviction was reversed.[3]

On the third trial under this indictment Hetenyi was again convicted of murder in the second degree. On appeal

---

[1] People v. Hetenyi, 277 App.Div. 310, 98 N.Y.S.2d 990 (4th Dep't 1950).

[2] People v. Hetenyi, 301 N.Y. 757, 95 N.E.2d 819 (1950).

[3] People v. Hetenyi, 304 N.Y. 80, 106 N.E.2d 20 (1952).

the Appellate Division affirmed the judgment.[4] Leave to appeal to the New York Court of Appeals was denied.

Four years later the Supreme Court of the United States decided Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Green had been tried for murder in the first degree and found guilty of murder in the second degree, but on retrial, following reversal of the second degree murder conviction, he was convicted of first degree murder. Under the Fifth Amendment of the United States Constitution the Court ruled that Green had been placed twice in jeopardy for the same offense. Arising in the District of Columbia this case, of course, had been tried in the federal courts and was governed by the double jeopardy safeguard of the Fifth Amendment rather than the due process guarantee of the Fourteenth Amendment. The Supreme Court was careful to point out that certain of its earlier decisions[5] involving state proceedings did not control the case before it.[6] Nevertheless, the relator sought a writ of habeas corpus in the New York Supreme Court, Clinton County. The application was denied and that denial was affirmed by the appellate Division of the Supreme Court, Third Department.[7] Permission to appeal to the New Cork Court of Appeals was ultimately denied.

On January 4, 1963, Hetenyi applied to the United States District Court at Rochester, New York, for a writ of

---

[4] People v. Hetenyi, 282 App.Div. 1008, 125 N.Y.S.2d 689 (4th Dep't 1953).

[5] Kring v. State of Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1882); Brantley v. State of Georgia, 217 U.S. 284, 30 S.Ct. 514, 54 L.Ed. 768 (1910); Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

[6] Green v. United States, 355 U.S. 184, 194-195 n. 15, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

[7] People ex rel. Hetenyi v. Johnston, 10 A.D.2d 121, 198 N.Y.S. 2d 18 3d Dep't 1960).

habeas corpus.[8] Relying on the Supreme Court's decision in Darr v. Burford, 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761 (1950),[9] the District Court denied the application without prejudice because of the relator's failure to seek certiorari in the United States Supreme Court. Subsequently, the Second Circuit Court of Appeals denied Hetenyi's application for a certificate of probable cause. On January 7, 1964, the United States Supreme Court denied certiorari with a note that Mr. Justice Douglas was of the opinion that certiorari ought to have been granted.[10]

Were the relator presently held on a judgment of conviction for the crime of Murder in the First Degree, it appears quite clear that he would not be in custody in violation of any federally secured right. See Kring v. State of Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1882); Brantley v. State of Georgia, 217 U.S. 284, 30 S.Ct. 514, 54 L.Ed. 768 (1910); Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937); Hoag v. New Jersey, 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed.2d 913 (1958). Being in custody for the crime of Murder in the Second Degree, having been found guilty of no lesser charge, it appears that the procedure complained of has not resulted in any hardship to the relator. The application, accordingly, is denied.

The clerk is directed to file relator's application without prepayment of fees.

Certificate of probable cause for appeal is denied.

---

[8] United States ex rel. George Hetenyi v. Walter H. Wilkins, Warden of Attica State Prison, Civil 10,082, Jan. 4, 1963.

[9] Overruled in pertinent part by Fay v. Noia, 372 U.S. 391, 435, 83 S.Ct. 822 9 L.Ed.2d 837 (1963).

[10] Hetenyi v. Wilkins, Warden, 375 U.S. 980, 84 S.Ct. 495, 11 L.E.2d 426 (1960); see also the dissents of Mr. Justice Douglas in Brock v. N. C., 344 U.S. 424, 425, 73 S.Ct. 349, 97 L.Ed. 456 (1953) and Hoag v. New Jersey, 356 U.S. 464, 477, 78 S.Ct. 829, 2 L.Ed.2d 913 (1958).

Appendix A.

Permission to appeal in forma pauperis is also denied with the qualification that the relator may file with the Clerk of the United States District Court, United States Courthouse, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the relator from applying directly to the Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York City, for a certificate of probable cause and for permission to prosecute an appeal in forma pauperis.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 373—September Term, 1964.

(Argued March 12, 1965 Decided July 13, 1965.)

Docket No. 29104

UNITED STATES OF AMERICA *ex rel.* GEORGE HETENYI,

Relator-Appellant,

—against—

WALTER H. WILKINS, Warden of Attica State Prison, Attica, New York,

Respondent-Appellee.

Before:

SMITH and MARSHALL, *Circuit Judges*
and METZNER, *District Judge.**

Appeal from an order of the District Court for the Western District of New York, John O. Henderson, *Judge,* denying an application for a writ of habeas corpus. Reversed.

MARSHALL, *Circuit Judge:*

George Hetenyi is presently imprisoned in Attica, New York, by the State of New York under a sentence of from forty years to life that was imposed after a jury found

---

* Sitting by designation.

him guilty of murder in the second degree. He applied to the United States District Court for the Western District of New York for a writ of habeas corpus pursuant to 28 U. S. C. § 2241, claiming that he is being held in custody in violation of the federal Constitution. The District Court denied his application on the merits, and this is an appeal from that order. We reverse.

On or about April 22, 1949 Hetenyi's wife was shot to death. Approximately one month later, on May 19, 1949, Hetenyi was indicted by the Grand Jury of Monroe County, New York, for murder in the first degree, and he was thrice tried on this same indictment.[1] At all three trials the evidence supporting the charge was circumstantial.

The first trial took place during December, 1949 in the Monroe County Court. The trial judge gave the jury the alternatives of finding Hetenyi guilty of first degree murder,[2] guilty of second degree murder,[3] guilty of first degree

---

[1] The indictment read:

"The Grand Jury of the County of Monroe by this Indictment accuse the Defendant, George Hetenyi, of the crime of Murder in the First Degree, in violation of § 1044, Subdivision 1 of the Penal Law of New York, committed as follows:

"The Defendant, on or about April 22, 1949, in the County of Monroe, State of New York, willfully, feloniously, and from a deliberate and premeditated design to effect the death of Jean Gareis Hetenyi, killed the said Jean Gareis Hetenyi by shooting her twice in the body with a firearm, thereby inflicting injuries which resulted in and caused her death."

[2] N. Y. Penal Law § 1044. "Murder in first degree defined

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed . . . from a deliberate and premeditated design to effect the death of the person killed, or of another. . . ."

[3] N. Y. Penal Law § 1046. "Murder in second degree defined

"Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation."

manslaughter[4] or not guilty. The jury returned a verdict of guilty of second degree murder, and in January, 1950 Hetenyi received a sentence of from fifty years to life. He appealed to the Appellate Division, Fourth Department, and that court unanimously reversed the judgment of conviction and granted a new trial. 277 App. Div. 310, 98 N. Y. S. 2d 990 (1950). The Appellate Division noted "that the verdict is supported bysufficient evidence," yet it found error affecting "the substantial rights of the defendant" in the charge relating to venue, in the admission of certain evidence, and in certain comments by the District Attorney on some of this evidence. Specifically, reverisible error was found in the trial court's refusal to charge the jury, as requested by defendant, "that they must find as a fact in this case that this killing occurred in the County of Monroe before they can find a conviction," in the trial court's charge that "it makes no difference as to where those shots [killing his wife] were fired," and in charging that finding her body "within the confines of the County of Monroe, is sufficient as a presumption of law that the shots were fired in the County of Monroe . . ." The Appellate Division also held that the trial judge had committed reversible error by admitting into evidence a leather holster found near the place where the body of the deceased was discovered and by allowing the District Atorney to argue in his summation that the holster belonged to defendant and "that without question it includes the gun." There was no direct evidence that this holster was the one claimed to have been seen in Hetenyi's car some months prior or that Hetenyi ever owned a gun. Hetenyi also sought reversal because the prosecution had used an article in a magazine relating to

---

[4] N. Y. Penal Code § 1050. "Manslaughter in first degree

"Such homicide is manslaughter in the first degree, when committed without a design to effect death . . . in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon."

the paraffin nitrate test. At the trial, the subject of the test was brought up by the District Attorney on direct examination of a police officer; on cross-examination, Hetenyi's counsel read from a textbook on the subject; and on redirect the article from the magazine was read, apparently to contradict the textbook. The Appellate Division concluded that since "no such test was made of defendant's hands," "the whole matter was irrelevant and incompetent" and "it was error to permit the reading of either the textbook or the article." It was on the basis of all of these errors, held to affect "defendant's substantial rights," that the Appellate Division reversed and ordered a new trial. The State appealed from this reversal but the order of the Appellate Division was unanimously affirmed by the Court of Appeals of New York without opinion. 301 N. Y. 757, 95 N. E. 2d 819 (1950).

Following this reversal, the same District Attorney proceeded to try Hetenyi for the second time under the same indictment charging first degree murder. The trial took place in April and May of 1951 in the Monroe County Court. The jury returned a verdict of guilty of murder in the first degree and Hetenyi was sentenced to be executed. Hetenyi appealed directly to the Court of Appeals, and a closely-divided court reversed the judgment of conviction and ordered a new trial. 304 N. Y. 80, 106 N. E. 2d 20 (1952). The Court of Appeals held that there was no error in charging the jury that the place of the killing need not be proved beyond a reasonable doubt. The Court also held that the admission into evidence of the holster introduced into evidence in the first trial was not "a material error" requiring reversal because the District Attorney's statement that was found so objectionable in the appeal from the first trial was lacking, and the trial judge had instructed the jury that even if they believed that this holster was the one previously seen in Hetenyi's car, "they may not draw from that the inference that he possessed the gun which it ac-

commodated." However, the Court found that certain other conduct of the District Attorney had deprived Hetenyi of a fair trial and on the basis of those errors reversed. The Court viewed the "District Attorney's repeated accentuation of the defendant's failure to testify" as sufficient to make the trial unfair; and it held that the District Attorney's attack on Hetenyi's character in which the changes in Hetenyi's religious affiliations were emphasized and Hetenyi was accused of being a "renegade," "a man to whom religion is a fraud, who engages in it purely and simply for selfish reasons," violated a "rule of fundamental fairness in the protection of the individual against unjust prosecution." A new trial was ordered.

Hetenyi was then tried for the third time. This third trial took place in March, 1953 in the Onondaga County Court, as Hetenyi had obtained a change in venue. Once again he was tried upon the same 1949 indictment charging him with first degree murder; and as was done in the other two trials, the trial judge gave the jury the alternatives of returning a verdict of guilty of first degree murder, guilty of second degree murder, guilty of first degree manslaughter, or not guilty. The jury returned a verdict of guilty of second degree murder, and Hetenyi was sentenced to prison for forty years to life. He appealed to the Appellate Division, Fourth Department, and that court affirmed the judgment in a *per curiam* opinion. 282 App. Div. 1008, 125 N. Y. S. 2d 689 (1953). The Appellate Division noted that the verdict "is amply supported by the evidence" and that "throughout the trial the court exercised extreme care in protecting the rights of the defendant," and concluded that the record "contains no errors which so adversely affect the substantial rights of the defendant as to warrant reversal of the judgment and a new trial." Leave to appeal to the New York Court of Appeals was denied.

Appendix B.

Hetenyi is presently being held in custody pursuant to a warrant of commitment issued by the Onondaga County Court upon this judgment of conviction. He claims that it was unconstitutional for the State to prosecute him for first degree murder subsequent to the first trial, and that the prosecution for first degree murder so tainted the third trial as to render it constitutionally inadequate.

This is not the first instance that Hetenyi claimed his detention is unlawful. Hetenyi sought a writ of habeas corpus from the New York courts, but the court of general jurisdiction dismissed the writ and this dismissal was affirmed by the Appellate Division, Third Department, 10 App. Div. 2d 121, 198 N. Y. S. 2d 18, *reargument denied,* 12 App. Div. 2d 574 (1960), *leave to appeal denied,* 8 N. Y. 2d 706, *appeal dismissed,* 8 N. Y. 2d 913. The Appellate Division found Hetenyi's claim to be without merit under the state and federal Constitutions, and added "one last point not raised by the briefs": the relator at neither his second nor his third trial raised the question of double jeopardy or entered such a plea and therefore he "waived his right to the defense of double jeopardy" under both federal and state constitutional standards. Without attempting to assess the sufficiency of the Appellate Division's conclusion, it should be noted that the factual premise appears incorrect. The petition in the present proceeding alleges that at the outset of both the second and third trials Hetenyi entered a plea of *autrefois acquit.* Respondent did not put that allegation into controversy below, and quite understandably the District Court did not make any finding as to its truth. We are nevertheless prepared to view the allegation as true, and thus to reject all factual basis for the waiver argument. In the course of argument before this Court, relator's counsel supported the allegation by reference to the trial transcript of the third trial, he explained that reargument was sought from the Appellate Division in order to correct its

factual inaccuracy, and he suggested that reargument was denied by the Appellate Division not because there was no factual error, but because the waiver argument resting on this factual inaccuracy was offered only as an alternative ground for affirming the order dismissing the writ. Respondent did not take issue with this offer of proof and explanation. We thus have no reason to disbelieve the allegation in the present habeas petition that the plea of *autrefois acquit* was entered but disallowed at the outset of the second and third trials.

Nor is this the first instance in which Hetenyi presented his constitutional claim to a federal court. After his application for the state habeas writ was dismissed, Hetenyi applied to a federal district court for a writ, though this time his claim was formulated solely on the basis of the federal Constitution. On January 4, 1963 the District Court denied the application without prejudice and without reaching the merits. *Darr* v. *Burford*, 339 U. S. 200 (1950), was held controlling and the habeas application was denied because Hetenyi had failed to file a petition for a writ of certiorari in the United States Supreme Court seeking review of the denial of his previous habeas application in the state courts. The District Court denied Hetenyi's application for a certificate of probable cause and Hetenyi applied to this Court for a certificate. This Court denied that certificate on May 8, 1963, even though *Fay* v. *Noia*, 372 U. S. 391 (1963) overruled *Darr* v. *Burford* some two months earlier and thus removed the procedural obstacle that had prevented the District Court from reaching the merits. Following this Court's denial of the certificate of probable cause, Hetenyi petitioned the Supreme Court for a writ of certiorari. On January 6, 1964 that petition was denied, with Mr. Justice Douglas noting that he was "of the opinion that certiorari should be granted." 375 U. S. 980.

Hetenyi persisted and renewed his application to a federal district court for the writ of habeas corpus. That court—at last—turned to the merits, but denied the application without a hearing[5] and unjustifiably refused to grant a certificate of probable cause. We granted the certificate and Hetenyi's constitutional claim is now before us.

I.

The Due Process Clause of the Fourteenth Amendment imposes *some* limitations on a state's power to reprosecute an individual for the same crime. Abhorrence to successive reprosecutions is deeply rooted in our common law traditions, and the Bill of Rights' curb on the power of the federal government to reprosecute is ample recognition of how central this abhorrence is to our constitutional concept of justice. Similar limitations have been placed on each of the states by their own constitutions and laws,[6] and this reveals a societal understanding that certain reprosecutions by a state are incompatible with due process

---

[5] Unfortunately the transcripts of the three trials have not been made part of the record in this collateral proceeding. Nevertheless, in order to verify the presumptions concerning the alternatives posed to the jury in the charge, we have examined the transcript of the charge in each trial. For the first two trials we had access to the trial transcript incorporated in the records on appeal to the Appellate Division, Fourth Department and for the third trial, the Clerk of the Onondaga County Court has forwarded a certified copy of those portions of the trial transcripts containing the charge. We have pursued this extraordinary course of taking judicial notice of these public documents because further delay in reaching the merits of Hetenyi's claim would be painfully unjust and it would not serve either the interests of the accused or the State.

[6] *Brock* v. *North Carolina*, 344 U. S. 424, 435 nn. 5 & 6 (1953) (Vinson, *C.J.*, dissenting); which must be updated by reference to Article I, section 9 of the Constitution of Alaska, and Article I, section 8, of the Constitution of Hawaii. See also *Bartkus* v. *Illinois*, 359 U. S. 121, 152-55 (1959) (Black, *J.*, dissenting).

of law. To hold, as we do, that the Due Process Clause of the Fourteenth Amendment imposes some restrictions on a state's power to reprosecute, thereby spanning the gap between the Fifth Amendment's double jeopardy prohibition and a similar prohibition derived from state laws, is to preserve this societal understanding and to read the Fourteenth Amendment as entrusting the federal courts with a responsibility and power to decide which reprosecutions by a state violate our basic notions of justice.

The Supreme Court has not, to this day, invalidated any conviction obtained in the state courts on the ground that the state has transgressed the federal constitutional limitations on its power to reprosecute an individual for the same crime. Yet authority for our initial proposition that some such limits do exist can be derived, first, from the premises and presumptions revealed in those Supreme Court cases in which a double jeopardy claim was interposed against a state, and, secondly, from the doctrine of selective incorporation, supported by a majority of the present Supreme Court, according to which certain guarantees of the Bill of Rights, those that are fundamental, are absorbed by the Due Process Clause of the Fourteenth Amendment and are thus made applicable to the states.

In 1902 Mr. Justice Harlan writing for the Court in *Dreyer* v. *Illinois,* 187 U. S. 71, 85-86, considered it an open question whether the Due Process Clause of the Fourteenth Amendment imposed any restrictions on the power of a state to reprosecute. In that case it was claimed that Illinois had transgressed those restrictions by reprosecuting the complainant after the first jury, having failed to agree, was discharged. The Court held that even under Fifth Amendment standards, as established by *United States* v. *Perez,* 22 U. S. (9 Wheat.) 579 (1824), the claim of double jeopardy was ill founded, and that therefore it could "pass this important question [of whether the Due Process Clause of the Fourteenth Amendment curbed the

power of the states to reprosecute] without any consideration of it upon its merits." This same question was similarly avoided in a like fashion in another case involving a reprosecution by a state following a hung-jury, *Keerl* v. *Montana*, 213 U. S. 135, 138 (1909); and perhaps Mr. Justice Harlan's opinion in *Shoener* v. *Pennsylvania*, 207 U. S. 188, 195-96 (1907) (trial on second indictment after first indictment dismissed on appeal as not charging a crime), could be read as employing the same technique of avoidance, although in *Schoener* it was necessary to determine as an original proposition that the Fifth Amendment standard was not violated, that the second prosecution did not place the complainant in double jeopardy, before it could "avoid" the question of whether any state reprosecutions would violate the Due Process Clause of the Fourteenth Amendment.[7]

The next important step occurred in 1937 in *Palko* v. *Connecticut*, 302 U. S. 319. The mode of analysis employed by Mr. Justice Harlan in *Dreyer* v. *Illinois*, which enabled that Court to avoid the question whether the Due Process Clause of the Fourteenth Amendment had any double jeopardy content, was unavailable to the Court in *Palko*, see 302 U. S. at 322-23. The complainant in *Palko* chal-

---

[7] See also *McDonald* v. *Massachusetts*, 180 U. S. 311, 313 (1901) and *Graham* v. *West Virginia*, 224 U. S. 616, 631 (1912), avoiding the related question of whether the Due Process Clause of the Fourteenth Amendment places any limitation on a state's power to impose multiple punishment, by relying on the fact that the multiple-offender statutes in controversy would not violate such limitations placed on the federal government by the Double Jeopardy Clause of the Fifth Amendment. However, in an earlier case, *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895), the Court did not make this distinction and simply held that a multiple offender statute did not punish an individual more than once for "the first offense" but only increased the punishment on "the last offense" and hence an accused sentenced according to the statute was "not twice put in jeopardy for the same offense." Cf. *Carlesi* v. *New York*, 233 U. S. 51 (1914).

lenged the power of a state to appeal from a judgment of conviction for a lesser degree of homicide than that charged in the indictment and to reprosecute him for the greater degree upon obtaining a reversal. Mr. Justice Cardozo read *Kepner* v. *United States,* 195 U. S. 100 (1904), as holding that such reprosecution would fall within the pale "of the prohibition of double jeopardy in federal prosecutions" and he "assumed for the purpose of the case at hand" that *Kepner* was still good law. Thus unable to employ the technique of avoidance fashioned in *Dreyer* v. *Illinois,* he sought to avoid the broader question of whether the Due Process Clause of the Fourteenth Amendment imposed any restrictions on a state's power to reprosecute an individual for the same crime by delineating the narrower question whether this particular "kind of double jeopardy" exceeded the limits imposed upon the states by the Due Process Clause of the Fourteenth Amendment. 302 U. S. at 328. However, in dealing with this narrower question it was necessary to articulate the "rationalizing principle" of the Due Process Clause and this principle was cast in such terms as to provide the foundation for an affirmative answer to the broader question. Drawing his most immediate guidance from *Twining* v. *New Jersey,* 211 U. S. 78 (1908), Mr. Justice Cardozo perceived the principle in these terms: the Due Process Clause of the Fourteenth Amendment prohibited the states from enforcing their criminal laws at the cost of violating some fundamental precept of justice, of imposing a "hardship so acute and shocking that our polity will not endure it."

The next intellectual step, the realization that a reprosecution by a state, simply because it was a reprosecution, could violate a fundamental precept of justice, was of no moment, and was accomplished without formal notice. In a series of cases commencing ten years after *Palko,* an assumption, certainly of the persuasion of a holding, gradually arose that the Due Process Clause of the Fourteenth

Amendment did impose some restrictions on the power of a state to reprosecute an individual for the same crime.

In *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459, 462-63 (1947), the case of an unsuccessful execution, Mr. Justice Reed, writing for himself, Chief Justice Vinson, Mr. Justice Black and Mr. Justice Jackson declared that "our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense," and concluded, *inter alia,* not that the Due Process Clause has no double jeopardy content, but that there is "no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution." Mr. Justice Frankfurter, concurring in the judgment to form the majority, explicitly stated that the Due Process Clause, viewed as prohibiting fundamentally unfair state procedures, had some double jeopardy content, see *infra* footnotes 8 and 9, while the dissenters did not concern themselves with double jeopardy, but only with the claim that a second attempt to execute the prisoner would be a cruel and unusual punishment. Then followed *Gryger* v. *Burke,* 334 U. S. 728, 732 (1948), where a unanimous Court held, without reserving the question of whether the Due Process Clause of the Fourteenth Amendment had any double jeopardy content, that a multiple offender statute does not subject "petitioner to double jeopardy," since the sentence as a multiple offender is not "viewed as either a new jeopardy or additional penalty for the earlier crimes." See *supra* footnote 7. The Court was not unanimous in *Brock* v. *North Carolina,* 344 U. S. 424 (1953), yet the differences between the Justices arose not so much from the general proposition that the Due Process Clause places some limits on the power of a state to reprosecute, but from the application of this proposition to the particular reprosecution challenged—the state retried the petitioner after the first trial was halted and a mistrial declared because of the temporary

unavailability of testimony by witnesses for the prosecution. The concurring Justice (Frankfurter, *J.*) and the dissenting Justices (Vinson, *C.J.* and Douglas, *J.*) openly embraced this general proposition, and although Mr. Justice Minton, writing for the Court, was less explicit, he did perceive the question presented (using the language of *Palko*), as whether "that kind of double jeopardy" was "a hardship so acute and shocking that our polity will not endure it." *Wade* v. *Hunter*, 336 U. S. 684 (1949), a case under the Double Jeopardy Clause of the Fifth Amendment was used to justify a negative answer to this question in *Brock*. Similarly in *Hoag* v. *New Jersey*, 356 U. S. 464 (1958), there was ample acknowledgment that certain state reprosecutions would be constitutionally impermissible. The petitioner was alleged to have robbed five persons on the same occasion. He was first tried and acquitted for robbing three of the victims; and the Supreme Court held that a second trial based on an indictment charging him with robbing the fourth victim was not an "impermissible use of multiple trials." Yet its premise was that some uses of multiple trials would be constitutionally impermissible, see 356 U. S. at 467-69. See also *Ciucci* v. *Illinois*, 356 U. S. 571 (1958) (fragmented prosecution for homicide). *Bartkus* v. *Illinois*, 359 U. S. 121 (1959), completes this evolution, for in that case all the Justices assumed that there is some double jeopardy content to the Fourteenth Amendment. A state reprosecution following an acquittal in a federal prosecution for the same conduct, robbing a federally insured savings and loan association, was held permissible only because it was viewed as a reprosecution by another sovereignty for a crime against it. See also *Abbate* v. *United States*, 359 U. S. 187 (1959). But compare *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964). The Court's opinion in *Bartkus*, written by Mr. Justice Frankfurter, contains abundant suggestions

that if the successive prosecutions were both conducted by the same sovereignty, such as Illinois, the Due Process Clause of the Fourteenth Amendment would be violated; and Mr. Justice Frankfurter's separate concurrences in *Louisiana ex rel. Francis* v. *Resweber, supra,* 329 U. S. at 469[8] and *Brock* v. *North Carolina, supra,* 344 U. S. at 429[9] need only be recalled to confirm this interpretation. Thus *Bartkus* firmly establishes that the Due Process Clause of the Fourteenth Amendment does impose some restrictions on the power of a state to reprosecute an individual for the same crime, though we are told, by none other than Mr. Justice Frankfurter, that this proposition had been established more than thirty years prior: "[I]n *Palko,* the Court ruled that . . . at some point the cruelty of harassment by multiple prosecutions by a State would offend due process." 359 U. S. at 127.

Authority for this proposition can also be derived from the doctrine of selective incorporation, under which certain guarantees of the Bill of Rights, those that are fundamental, are absorbed by the Fourteenth Amendment and thereby made applicable to the states. This doctrine, which received its most immediate formulation in Mr. Justice Brennan's dissenting opinion in *Cohen* v. *Hurley,* 366 U. S. 117, 154 (1961) has been firmly adopted, at least in its broad outlines, as part of constitutional law by *Pointer* v. *Texas,* 33 U. S. L. Week 4306 (U. S. April 5, 1965), if not by *Malloy* v. *Hogan,* 378 U. S. 1, 10-11 (1964). See also

---

[8] "A State may offend such a principle of justice by brutal subjection of an individual to successive retrials on a charge on which he has been acquitted."

[9] "A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

Appendix B.

Griffin v. *California*, 33 U. S. L. Week 4382 (U. S. April 28, 1965); *Douglas* v. *Alabama*, 33 U. S. L. Week 4304 (U. S. April 5, 1965); Brennan, *The Bill of Rights and the States*, 36 N. Y. U. L. Rev. 761 (1961); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 Yale L. J. 74 (1963). For this doctrine to lend support to the proposition that the Fourteenth Amendment imposes some restrictions on the power of the states to reprosecute, the judgment need only be made that at least the basic core of that double jeopardy guarantee can be ranked as fundamental. We have no hesitation in so holding. The Supreme Court has not made this value judgment in the context of applying the doctrine of selective incorporation. Yet there can be no doubt that "the idea that one trial and one punishment were enough" "was brought to this country by the earliest settlers as part of their heritage of freedom, and . . . it has been recognized here as fundamental again and again," *Bartkus* v. *Illinois*, *supra*, 359 U. S. at 153-54 (Black, *J.* dissenting) and it has been declared that "the basic idea is part of our American concept of fundamental fairness," *Brock* v. *North Carolina*, *supra*, 344 U. S. at 435 (Vinson, *C.J.*, dissenting). See also, *Ex parte Lange*, 85 U. S. (18 Wall.) 163 (1874), and the majority and dissenting opinions in *Green* v. *United States*, 355 U. S. 184, 198 (1957). Moreover, we are led to the same conclusion by comparing the basic core of the double jeopardy provision of the Fifth Amendment to those other guarantees of the Bill of Rights already held by the Supreme Court, at least in effect, to be absorbed—the First Amendment,[10] the Fourth Amendment,[11] the Just

---

[10] See, e.g., *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

[11] *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Ker* v. *California*, 374 U. S. 23 (1963).

Compensation[12] and Self-Incrimination[13] Clauses of the Fifth Amendment, the Right to Counsel[14] and Confrontation Clauses[15] of the Sixth Amendment, and the Eighth Amendment's prohibition against cruel and unusual punishments.[16] It would be indeed difficult to maintain that the basic core of the double jeopardy guarantee is not as fundamental as some of these guarantees and that therefore it should not be included in the universe of those guarantees of the Bill of Rights that are absorbed by the Fourteenth Amendment and made applicable to the states. *Palko* lends no support to such exclusion.

In *Palko* Mr. Justice Cardozo noted that certain "privileges and immunities . . . have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption." He "assumed" that the procedure challenged would be impermissible under the Fifth Amendment standards[17] if it were employed by the federal government rather than a state, and yet held that the procedure did not violate the Due Process Clause of the Fourteenth Amendment. Although, *Palko*, if its authority is presumed to be unim-

---

[12] See *Chicago, B & Q. R.R. Co.* v. *Chicago*, 166 U. S. 226 (1897).

[13] *Malloy* v. *Hogan*, 378 U. S. 1 (1964).

[14] *Gideon* v. *Wainwright*, 372 U. S. 355 (1963).

[15] *Pointer* v. *Texas*, 33 U. S. L. Week 4306 (U. S. April 5, 1965).

[16] *Robinson* v. *California*, 370 U. S. 660 (1962); see *Malloy* v. *Hogan, supra*, 378 U. S. at 6 n. 6.

[17] *Kepner* arose in the Philippine Islands under a statutory prohibition against double jeopardy. But the statutory prohibition and Fifth Amendment employed identical language and apparently Mr. Justice Cardozo did not perceive any difference between that statutory standard and the constitutional standard applied to "federal prosecutions."

paired, perhaps means that not all of the double jeopardy guarantee of the Fifth Amendment would be "absorbed" under the doctrine of selective incorporation, it does not mean that no part of the guarantee would be "absorbed," or that the basic core of the guarantee would not be "absorbed." See generally, Henkin, *"Selective Incorporation" in the Fourteenth Amendment,* 73 Yale L. J. 74, 80-81 (1963). Undoubtedly Mr. Justice Cardozo was much attracted by Mr. Justice Holmes' dissent in *Kepner,* see Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecution,* 74 Harv. L. Rev. 1, 11-12 (1960), and it is clear that he did not regard the basic core of the double jeopardy protection threatened by the Connecticut statute. See 302 U. S. at 328.

There is a serious question as to whether the doctrine of selective incorporation permits two levels of selection—absorption of only those provisions of the Bill of Rights that are fundamental, and then absorption of only that part of the provision that is fundamental, its basic core. Many statements in recent Supreme Court decisions suggest a negative answer to that question, see *Cohen* v. *Hurley, supra,* 366 U. S. at 154 (Brennan, *J.*, dissenting); *Malloy* v. *Hogan, supra,* 378 U. S. at 11; *Ker* v. *California,* 374 U. S. 23 (1963); *Griffin* v. *California,* 33 U. S. L. Week 4382 (U. S. April 28, 1965). It is nevertheless possible that the doctrine of selective incorporation may permit two levels of selection at least in relation to the double jeopardy provision of the Fifth Amendment. It has been suggested that certain of the restrictions emanating from this provision are, unlike many of the provisions of the Bill of Rights already absorbed, "technical ramifications," *Brock* v. *North Carolina, supra,* 344 U. S. at 425 (Vinson, *C.J.*, dissenting) and that some of the cases involving that provision turn on "subtle technical controversies," *id.* at 428 (Frankfurter, *J.*, concurring), "engendered by technical aspects of double jeopardy as enshrined in the Fifth

Amendment," *Louisiana ex rel. Francis* v. *Resweber, supra,* 329 U. S. at 469 (Frankfurter, *J.*, concurring). Moreover, Justice Goldberg's concurrence in *Pointer* v. *Texas,* announcing his acceptance of the process of absorption, finds this process to be conceived in *Palko*—which is both consistent and suggestive of a version of the doctrine of selective incorporation which permits only the basic core of the Double Jeopardy Clause of the Fifth Amendment to be absorbed by the Fourteenth Amendment.

However, even if this version of the doctrine of selective incorporation be rejected the Supreme Court has three alternatives: (i) holding that the doctrine of selective incorporation does not reach the double jeopardy provision of the Fifth Amendment; (ii) overruling *Palko;* or (iii) overruling those prior decisions,[18] such as *Kepner,* that withheld from the federal government the power to conduct reprosecutions that have not been considered to be fundamentally unfair and hence not forbidden to the states. We find the first alternative the most unlikely, primarily because it is predicated on the value judgment that the double jeopardy guarantee of the Fifth Amendment, taken in this instance to be as wide as the provision itself, is not fundamental. Yet even if it be finally determined that the doctrine of selective incorporation does not permit two levels of selection, and further the first alternative set out above is chosen, the conclusion is, in light of *Bartkus* and its precursors, not that the Due Process Clause of the Fourteenth Amendment imposes no limitations on the power of the states to reprosecute, but rather that those limitations are not structured in terms of the double jeopardy provision of the Fifth Amendment. This might make a difference as to *which* reprosecutions are constitutionally

---

[18] E.g., compare *Brock* v. *North Carolina,* 344 U. S. 424 (1953) with *Downum* v. *United States,* 372 U. S. 734 (1963) and *Gori* v. *United States,* 367 U. S. 364 (1961).

forbidden to the states, but it would not impair our initial proposition that *some* reprosecutions are forbidden.

II.

In attempting to formulate the standards for determining *which* state reprosecutions transgress the limitations imposed by the Due Process Clause of the Fourteenth Amendment, we envision three alternative standards:

(1) The Federal Standard. Under this standard the state reprosecution would be tested by the provision of the Fifth Amendment commanding that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." All the cases applying this clause to federal prosecutions would have the persuasion of precedent, and this inheritance would have the effect of accelerating the usual development of decisional constitutional law. Such a standard would emanate from a holding that the doctrine of selective incorporation reaches the double jeopardy provision of the Fifth Amendment, and further that this provision is absorbed intact, that the doctrine does not permit a second level of selection.

(2) The Basic Core Standard. This standard would stem from the inclusion of the double jeopardy provision of the Fifth Amendment within the doctrine of selective incorporation, with the understanding that the criteria of fundamentality would be applied once again so as to delineate the basic core of that provision; it would be this basic core that is absorbed by the Fourteenth Amendment. Under this standard the state reprosecution would be tested by the Fifth Amendment double jeopardy provision, but there would be a further need to determine, once it is decided that the reprosecution falls within the ambit of that provision, whether such restrictions are fundamental to the provision. Cases applying the provision to federal

prosecutions would be of precedential value only after it has been determined that the result did not turn on a technical nuance of the provision.

(3) The Fundamental Fairness Standard. This standard has its roots in a concept of due process that is not structured by the absorption of any specifics of the Bill of Rights and thus it reflects a rejection of both versions of the doctrine of selective incorporation or finds the double jeopardy guarantee not within the reach of that doctrine. To apply this standard, the question is asked whether the state reprosecution challenged is fundamentally unfair and the cases applying the Fifth Amendment to federal prosecutions are not binding, although they, like those cases applying double jeopardy provisions derived from state law, are entitled to weighty consideration.

We find it both undesirable and unnecessary to choose among these alternative standards. This opinion is being written at a moment when this dimension of constitutional law is being reconsidered and refashioned by the Supreme Court and therefore the only advantage to be found from choosing among the standards—guidance for other lower courts—would not be forthcoming, or at the most it would be transitory. Moreover, choosing among the standards would be somewhat pretentious. Choosing would require us to engage in a debate that has sharply divided the Supreme Court, it might involve an implicit if not an explicit overruling of venerable Supreme Court decisions, and it is unnecessary for us to choose among the standards an order to decide the instant case. Under any of the three alternative standards, the conclusion is unavoidable that New York transgressed the federal constitutional limitations on its power to reprosecute an individual for the same crime. The reprosecution of Hetenyi for first degree murder following the completion of the first trial, in which he was prosecuted for first degree murder and the jury returned

a verdict of guilty of second degree murder, constitutes such a transgression under any of the three standards.

Green v. *United States*, 355 U. S. 184 (1957), is decisive on this issue under the federal standard, and it goes a long way toward deciding the issue under the basic core standard. The factual pattern of *Green*, in its most essential aspects, is identical with that of the instant case, save that it involved reprosecutions by the District of Columbia, thereby making the Fifth Amendment directly applicable. The petitioner in *Green* was first tried under an indictment charging him with arson and first degree murder. The jury found him guilty of arson and of second degree murder; and he successfully appealed the second degree murder conviction. The Government then reprosecuted him for first degree murder and the Supreme Court held that such a reprosecution violated the double jeopardy provision of the Fifth Amendment. Thus under the federal standard, *Green* is ample viable precedent in support of Hetenyi's constitutional challenge to the successive reprosecutions for first degree murder. It also appears to be of equal force under the basic core standard, for *Green* involved more than a "subtle technical controversy" and the decision rested on that aspect of the Fifth Amendment double jeopardy provision that must be ranked as fundamental. This can be gleaned from the tenor and the text of the Court's opinion (see e.g., the concluding paragraph, 355 U. S. at 198), even after some account is taken of the fact that the Justices were closely divided. It can also be supported by the same factors that will be considered in applying the fundamental fairness standard.

Our application of the fundamental fairness standard commences with a disclaimer. We are not proceeding on the factual assumption that when the jury at the first trial returned a verdict of guilty of murder in the second degree it also (impliedly) returned a verdict of not guilty of murder in the first degree. We start from the view that the

jury's silence on the first degree murder charge simply meant that the state had tried but failed to obtain a conviction on the first degree murder charge, and we recognize that there are several possible explanations for this failure: (a) An acquittal on the first degree murder charge—the jury unanimously believed that the prosecution had failed to prove beyond a reasonable doubt that Hetenyi killed his wife with a premeditated and deliberate design (although, as seen from the guilty verdict on the second degree murder charge, they believed that the prosecution had proved beyond a reasonable doubt that he intentionally committed the homicide). (b) A failure to agree on the first degree murder charge—the jury could not reach any unanimous judgment as to whether or not the prosecution had proved beyond a reasonable doubt that Hetenyi killed his wife with a premeditated and deliberate design (although they could reach a unanimous judgment on the second degree charge and chose the alternative they all agreed upon). (c) An expression of sympathy—the jury unanimously believed that the prosecution had proved beyond a reasonable doubt that Hetenyi killed his wife with a premeditated and deliberate design, but chose to render a guilty verdict on the second degree murder charge rather than the first degree murder charge because they all "felt sorry for him" or thought the penalties for the greater degree would be "too severe." (d) A nonrational choice—for example, the jury did not understand the difference between the various degrees of homicide or the jury made a choice between the various degrees on the basis of some method of random selection.

There is no way of conclusively deciding now, as a factual matter, which of the above alternatives explains the jury's silence. Certainly, the first alternative set out above—that the silence implied an acquittal—is at least a reasonable possibility. Cf. *Green* v. *United States, supra,* 355 U. S. at 190-91. An inconsistency between acquitting

him of first degree murder and convicting him of second degree murder might suggest that the silence could be explained as an expression of sympathy or a nonrational choice, see Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 24 (1960), but there is no inconsistency here. Also the jury was charged[19] not to "reduce the crime charged to a lower degree simply for the purpose of avoiding the performance of an unpleasant duty" and it was charged in such a manner that would make it superfluous for it to add to its verdict finding Hetenyi guilty of second degree murder the words "And we also find him not guilty of first degree murder." However, although there is a reasonable possibility that the first jury's silence on the greater charge was due to its unanimous belief that the prosecution failed to prove that charge beyond a reasonable doubt, this is not the only possibility. The silence permits only one certainty—the state had tried but failed to obtain a conviction for that first degree murder. Starting from this basic datum we conclude that in these circumstances a reprosecution for first degree murder is fundamentally unfair.

Even viewing the four alternative explanations of the jury's silence set out above as equal possibilities, we are of

---

[19] The judge in the first trial charged the jury in part:

"In other words, if you are satisfied beyond a reasonable doubt, based upon all of the evidence in this case, of the defendant's guilt of the crime charged, namely, murder in the first degree, you should not, under those circumstances, reduce the crime as charged to a lower degree simply for the purpose of avoiding the performance of an unpleasant duty.

"I charge you that when it appears from the evidence that a reasonable ground of doubt in which of two or more degrees he is guilty he can be convicted of the lower degree only . . .

"Your verdict in this case may be in one of the four forms: first, Guilty of Murder in the First Degree; second, Guilty of Murder in the Second Degree; third, Guilty of Manslaughter in the First Degree; fourth, Not Guilty." (Record on Appeal to the Appellate Division, Fourth Department, pp. 595-603.)

the opinion that it was fundamentally unjust to reprosecute Hetenyi for first degree murder after the completion of the first trial. Such a reprosecution was cruel and inhuman, imposing on the accused a "hardship so acute and shocking that our polity will not endure it" (*Palko* v. *Connecticut*, 302 U. S. at 328), and we make this judgment with full realization that the "standards of fairness and justice" to be applied are not "merely personal standards but the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce" (Mr. Justice Frankfurter concurring in *Louisiana ex rel. Francis* v. *Resweber, supra*, 329 U. S. at 470). The insecurity and anxiety, the opportunity of harassment, and the marginal increase in the probability of convicting the accused of a crime he did not commit by simply trying him again form the basis of our fear and abhorrence of reprosecutions. These evils are all presented by a reprosecution for first degree murder following the jury's silence on that charge. Their presence does not hinge upon whether this silence factually meant that Hetenyi had been acquitted of the charge in contrast to the uncontroverted fact that the state failed to convict Hetenyi of that charge. Cf. *Ex parte Lange, supra*, 85 U. S. at 169; *United States* v. *Ball*, 163 U. S. 662, 669 (1896); *Kepner* v. *United States, supra*, 195 U. S. at 130; *Green* v. *United States, supra*, 355 U. S. at 187; *Fong Foo* v. *United States*, 369 U. S. 141 (1962); *Downum* v. *United States*, 372 U. S. 734 (1963). There are, at least under the fundamental fairness standard, certain circumstances in which the legitimate societal interest justify a reprosecution, even though it may impose these hardships on the accused, but we are unable to find any such interest in the instant case. In fact, what New York offers as the justification for such reprosecutions turns out to be an additional evil contributing, quite materially, to the fundamental unfairness—that the reprosecution for first degree murder was conditioned upon

the accused *successfully* appealing from the second degree murder conviction.[20]

Prior to 1881 the courts of New York held that if an accused was tried for a greater degree of a crime and the jury returned a verdict for a lesser degree and was silent on the greater degree, as it usually is, the State could not reprosecute the accused for the greater degree (regardless of whether the accused successfully appealed his conviction for the lesser degree). *Guenther* v. *People*, 24 N. Y. 100 (1861); *People* v. *Dowling*, 84 N. Y. 478 (1881). This was ample recognition of the unfairness and injustice of a reprosecution for the greater charge. However, in 1881 the Legislature of New York enacted sections 464[21] and 544[22]

---

[20] The possible explanations for the jury's silence on the homicide charge that was less in degree than that for which a conviction was obtained, are quite different than the possible explanations for its silence on the charge that was greater in degree than that for which a conviction was obtained, see *supra*, p. 2667. While the silence on the greater degree could be described as a failure to obtain a conviction, this description of the silence on the lesser charge (first degree manslaughter) would be entirely inappropriate; the conviction (for second degree murder) obtained made a conviction for a lesser degree of homicide entirely superfluous. The punishment for first degree manslaughter is no greater than that for second degree murder; and the elements of the latter crime includes, under the facts of this case, all those of the former. It would not be cruel or inhumane to subject the accused to reprosecution for first degree manslaughter if the State could, in the same circumstances, reprosecute him for a greater degree of homicide (second degree murder); and the risk of being reprosecuted for a charge that was lesser in degree than that for which a conviction was obtained would not put an unconscionable premium on successfully appealing the conviction.

[21] N. Y. Code of Criminal Procedure § 464. "Effect of granting new trial

"The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew; and the former verdict cannot be used or referred to, either in evidence or in argument."

[22] N. Y. Code of Criminal Procedure § 544. "New trial

"When a new trial is ordered, it shall proceed in all respects as if no trial had been had."

of the Code of Criminial Procedure, which provide that granting a "new trial places the parties in the same position as if no trial had been had" and the new trial "shall proceed in all respects as if no trial had been had." These sections were interpreted as authorizing reprosecution on the greater degree charged if the conviction on the lesser degree is reversed, and it was also held that such reprosecutions were not forbidden by the state constitutional guarantee against double jeopardy, *People* v. *Palmer*, 109 N. Y. 413, 17 N. E. 213 (1888); see also, *People* v. *McGrath*, 202 N. Y. 445, 96 N. E. 92 (1911); *People* v. *Ercole*, 4 N. Y. 2d 617, 152 N. E. 2d 77, 176 N. Y. S. 2d 649 (1958). Yet it remained the law of New York that if the conviction on the lesser charge was left standing, either because no appeal was taken or the appeal was not successful, a reprosecution for the greater charge, upon which the jury was silent, would be impermissible. In that instance the jury's silence on the greater charge would be "equivalent to a verdict of not guilty" of that charge, *People* v. *McCarthy*, 110 N. Y. 309, 314, 18 N. E. 128, 129 (1888); N. Y. Penal Law § 32.[23] Hence, New York conditions the power of the state to reprosecute upon a successful appeal by the accused from the conviction for lesser charge, or, to look at it from the view of the accused, under New York law, his right to appeal from a conviction for the lesser degree can only be exercised at the risk of being reprosecuted for the greater charge as well as the lesser charge if the appeal is successful, even though the state had once failed to obtain a conviction on the greater charge. This places the accused in a

---

[23] N. Y. Penal Law § 32. "Acquittal or conviction bars indictment for another degree

"Where a prisoner is acquitted or convicted, upon an indictment for a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime, in any other degree, nor for an attempt to commit the crime so charged, or any degree thereof."

dilemma which was described by the Supreme Court in *Green* v. *United States, supra,* 355 U. S. at 193, as "incredible," and which is, to be sure, no less incredible because it was devised by New York rather than the federal government. By placing this unconscionable premium upon a successful appeal by an accused, a "vital societal interest" is threatened—assuring that liberty shall not be deprived without a trial free from legal error prejudicing the accused's substantial rights. Compare *Stroud* v. *United States,* 251 U. S. 15 (1919); *People* v. *Henderson,* 60 Cal. 2d 472, 386 P. 2d 677, 686 (1963); see Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant,* 74 Yale L. J. 606, 623-636 (1965).

It is difficult to understand how the fundamental unfairness inherent in allowing a prosecutor to "do better a second time" (Mr. Justice Frankfurter, concurring in *Brock* v. *North Carolina, supra,* 344 U. S. at 429) is mitigated by conditioning this second chance on a successful appeal by the accused. To suggest that the accused, by appealing the conviction, somehow "agreed" to subject himself to the reprosecution on the greater charge if the conviction for the lesser charge is reversed, thereby rendering such a reprosecution fair, cf. *People* v. *Palmer, supra,* is to ignore the elementary psychological realities of the situation, see, *Kepner* v. *United States, supra,* 195 U. S. at 135 (Holmes, J., dissenting), *Green* v. *United States, supra,* 355 U. S. at 192, and to presume, quite inconsistently with the evolution of our communal values, that a barter theory of fairness operates with no less force in the halls of justice than it does in the market place, see generally, *Fay* v. *Noia,* 372 U. S. 391 (1963). Nor do we find any merit to the suggestion, cf. *People* v. *Ercole, supra,* that the reprosecution for the greater charge following the jury's silence on the greater charge and the reversal of the conviction for the lesser charge, serves the same interest as that served by the reprosecution held to be constitutional in *Palko*—that

the case against the accused "go on until there shall be a trial free from the corrosion of substantial legal error," 302 U. S. at 328.

In *Palko* the petitioner was initially tried for first degree murder. The jury returned a verdict of guilty of second degree murder and then the state was allowed to reprosecute petitioner for first degree murder following a reversal. The state had appealed from the judgment of conviction for second degree murder and it attacked, not the conviction it had obtained, but the one it had failed to obtain—the silence of the jury on the first degree murder charge.[24] Reversal on the state's appeal meant that the state had been prejudiced by substantial legal error, or to put it another way, the state's failure to obtain a guilty verdict on the first degree murder charge was in part infected by substantial legal error. To permit the state to reprosecute the accused for the greater charge in these circumstances was to provide the state with an opportunity "to do better a second time" only because it had been prejudiced by substantial legal error the first time, not because it simply failed to succeed the first time. The Supreme Court in *Palko* thought that this could hardly be classified as fundamentally unfair.

In contrast to *Palko*, in the instant case the state could not appeal and the accused's appeal was, of course, not based on a view that the failure of the state to obtain a conviction for first degree murder was infected by substantial legal error, but rather that the conviction the state had obtained was so infected. The success of Hetenyi's appeal

---

[24] This is why certain commentators read *Palko* as permitting reprosecutions following a successful appeal by the State from an acquittal. See, e.g., Mr. Justice Frankfurter's parenthetical statement in *Bartkus* v. *Illinois*, *supra*, 359 U. S. at 131: "It is worth noting that *Palko* sustained a first degree murder conviction returned in a second trial after an appeal by the State from an acquittal of first degree murder."

meant that he was prejudiced by substantial legal errors, and there is no basis for supposing that these errors—somehow—corroded the substantial rights of the prosecution and contributed to its failure to obtain a conviction on the first degree murder charge. See *supra* pp. 2646-48. The errors perceived could have only contributed to the success of the prosecution in obtaining a second degree murder conviction, not to the failure of the state to obtain a verdict of guilty of murder in the first degree. To permit the state to reprosecute the accused for the greater charge in these circumstances is to provide the prosecution with an opportunity "to do better a second time," not because it had been prejudiced by substantial legal error the first time, but because the accused had been prejudiced by substantial legal errors and because these errors had been perceived on appeal.

Where, as here, the errors perceived on appeal contributed to the success of the prosecution in obtaining the second degree murder conviction, and could have had no effect on the prosecution's lack of success in failing to obtain a first degree murder conviction, all legitimate interests served by permitting a reprosecution following a reversal of (see *United States* v. *Ball*, 163 U. S. 662 (1896)) or a successful collateral attack upon (see *United States* v. *Tateo*, 377 U. S. 463 (1964)) a conviction are satisfied by restricting the reprosecution to the second degree murder charge—the only one the jury found him guilty of on the first trial. By permitting reprosecution on the lesser charge, though barring it in these circumstances on the greater charge, the accused is not, to use the language of Mr. Justice Harlan, writing for the Court in *United States* v. *Tateo*, *supra*, 377 U. S. at 466, "granted immunity from punishment because" there were defects "sufficient to constitute reversible error in the proceedings leading to the conviction"; and appellate courts will remain "as zealous as they now are in protecting against the effects of im-

proprieties at the trial or pretrial stage," because the reversal of the conviction for the lesser degree would not "put the accused irrevocably beyond the reach of further prosecution," not any more so than if he did not appeal the conviction for the lesser charge.

Kring v. *Missouri*, 107 U. S. 221 (1882), and *Brantley* v. *Georgia*, 217 U. S. 284 (1910), do not lead us to a contrary conclusion, although the pattern of reprosecutions in those cases is identical with that in the instant case. Under either the federal standard or the basic core standard, whatever precedential value *Kring* and *Brantley* possess is vitiated by the significantly more recent case of *Green* v. *United States*, which prohibited the same pattern of reprosecutions. It is true that in footnote 15 of the *Green* opinion, 355 U. S. at 194, the statement is made that *Brantley* and *Kring* "are not controlling here since they involved trials in state courts." But this is merely to distinguish *Brantley* and *Kring*, not to approve them. It would not be unfair to say that at the time *Green* was decided, this distinction was not particularly meaningful to Mr. Justice Black, the author of the Court's opinion in *Green*, or to Mr. Justice Douglas, who, the very next Term, prefaced their joint dissent in *Hoag* v. *New Jersey*, *supra*, 356 U. S. at 477, with the statement: "*Green* v. *United States* . . . , involving a federal prosecution, provides . . . the standard for every state prosecution as well . . ." And this distinction lost, in effect, all meaningfulness when the doctrine of selective incorporation, the source of the federal and basic core standards, became firmly established as part of our constitutional law in *Pointer* v. *Texas*, some eight years after *Green*.

Moreover, even under the standard of fundamental fairness, we do not regard *Kring* or *Brantley* as compelling a conclusion that the state had the power to reprosecute Hetenyi for first degree murder following the conclusion of the first trial.

Appendix B.

First, it should be noted that *Kring* relates to the constitutional claim in this case only by way of a dictum—a vague and conclusory dictum. Prior to 1875 Missouri followed the course similar to that followed by New York until 1881. Then Missouri, like New York, amended its Constitution to abrogate the rule that barred reprosecution for first degree murder where the individual was initially prosecuted for first degree murder, convicted of second degree murder and he had successfully appealed this conviction. In *Kring* the Supreme Court did not hold that such a reprosecution satisfied the requirements of the Due Process Clause of the Fourteenth Amendment or that the clause had no double jeopardy content, a question Mr. Justice Harlan viewed as unresolved twenty years later in *Dreyer* v. *Illinois,* see *supra* pp. 2654-56. Instead the court held that the *ex post facto* clause of the federal Constitution prohibited the new procedure from being followed where the crime was alleged to have been committed before the amendment to the Missouri Constitution. It was as a prelude to sustaining this *ex post facto* claim that Mr. Justice Miller declared, without the slightest analysis or elaboration, "There is no question of the right of the State of Missouri, either by her fundamental law or by an ordinary act of legislation, to abolish this rule, and that it is a valid law as to all offenses committed after its enactment," 107 U. S. at 225.

Secondly, the significance of *Brantley,* which saved this pattern of reprosecution from a constitutional challenge derived from the Due Process Clause of the Fourteenth Amendment,[25] is somewhat impaired by the fact that it was

---

[25] The opinion in *Brantley* suggests, as a possible basis for distinction, that there the state reprosecution was challenged on the basis of the Fifth Amendment rather than the Due Process Clause of the Fourteenth Amendment: "This writ of error was sued out"

(Footnote continued on following page)

decided under the regime of *Trono* v. *United States*, 199 U. S. 521 (1905), which, if not overruled, was at least reduced to a non-constitutional stature by *Green* v. *United States*. *Trono* involved the same pattern of prosecution, though by the Government of the Philippine Islands, and this was held to be permissible. *Trono* had been handed down only five years before *Brantley*, and it was the only case the State of Georgia had cited in its brief to defend its power to reprosecute for the greater charge. Moreover, as late as 1909, one year prior to *Brantley* the Supreme Court had employed the mode of analysis devised by Mr. Justice Harlan in *Dreyer* v. *Illinois*, discussed *supra*, pp. 2654-56, of not deciding whether the Due Process Clause of the Fourteenth Amendment imposed double jeopardy limitations on the states by holding that even under Fifth Amendment standards the claims of double jeopardy were without merit. See *Keerle* v. *Montana*, *supra*, 213 U. S. at 138; see also the 1912 case of *Graham* v. *West Virginia*, *supra*, 224 U. S. at 631. Read in this context the final sentence of the short *Brantley per curiam*, disposing of the constitutional challenge with the words, "It was not a case of twice in jeopardy under any view of the Constitution of

---

(Footnote continued from preceding page)

and plaintiff in error contended that the judgment of the Supreme Court of Georgia was in violation of the Fifth Amendment of the Constitution of the United States . . ." 217 U. S. at 285. However, this appears to be a misstatement of the Constitutional claim (perhaps reflecting of the mode of analysis discussed in the text *infra*). The brief for the plaintiff-in-error clearly frames the constitutional challenge to the reprosecution in terms of the Due Process Clause of the Fourteenth Amendment, and, in fact, the brief reads: "It is not contended that the defendant is protected by . . . [the double jeopardy] clause of the Fifth Amendment . . . , for it is recognized that by a long line of decisions the first ten Amendments are not operative on the states" (pp. 2-3). Mr. Justice Frankfurter also interpreted *Brantley* as being "concerned [with] the Due Process Clause," *Green* v. *United States*, *supra*, 355 U. S. at 213, and presumably he meant the Fourteenth Amendment's Due Process Clause.

the United States," 217 U. S. at 285, could be fairly interpreted to mean that since *Trono* would permit the Government of the Philippine Islands, and perhaps even the federal government in general, to reprosecute the accused for the greater charge in such circumstances, there would be little basis for maintaining that a state would be barred by the Fourteenth Amendment from conducting such a reprosecution. *Trono* thus emerges as the linchpin of *Brantley*. Without *Trono* the Supreme Court might have reached the same result. But if *Trono* had been decided the other way, or, to express the same idea somewhat differently, if *Green* rather than *Trono* had been the antecedent to *Brantley*, the result in *Brantley* might have been quite different, even if the fundamental fairness standard were applied to determine whether the reprosecution were constitutionally permissible. *Green* not only construed the Double Jeopardy Clause of the Fifth Amendment; it also perceived and articulated the unfairness in such reprosecutions.[26] The fact that our constitutional understanding is now dominated by *Green* rather than *Trono* impairs the significance of *Brantley*.

Thirdly, and perhaps most significantly, the authority of *Brantley* and the *Kring* dictum (even if the latter be read to reach the instant double jeopardy claim) has been tarnished by the gradual but certain evolution of our constitutional understanding of justice and fairness. Mr. Justice Frankfurter, the most eloquent and ardent contemporary advocate of the fundamental fairness standard,

---

[26] For the educative impact of *Green*, see, e.g., *Gomez* v. *Superior Court*, 50 Cal. 2d 640, 328 P. 2d 976 (1958); *State* v. *Williams*, 30 N. J. 105, 152 A. 2d 9 (1959); *State* v. *Schoel*, 54 Wash. 2d 388, 341 P. 2d 481 (1959); reaching a similar result under state constitutions. Contrast, *Blanton* v. *Commonwealth*, 320 S. W. 2d 626 (Ky. 1958); *State* v. *Thomas*, 88 Ariz. 269, 356 P. 2d 20 (1960). For the state law prior to *Green*, see generally, Annot. 61 A. L. R. 2d 1141 (1958).

consistently maintained that in applying this standard the courts are permitted, nay are required, to re-evaluate prior interpretations of the Due Process Clause in light of "changing concepts as to minimum standards of fairness," *Green* v. *United States, supra,* 355 U. S. at 215 (dissenting opinion); see also, e.g., *Malinski* v. *New York,* 324 U. S. 401, 414 (1945) (concurring opinion); *Louisiana ex rel. Francis* v. *Resweber, supra,* 329 U. S. at 466-67; *Rochin* v. *California,* 342 U. S. 165 (1952); and with this view there could be little dispute. What was regarded as fair in one epoch of our history as a nation may be regarded as fundamentally unfair in the next, even though the judgment is "not *ad hoc* and episodic but duly mindful of reconciling the needs of continuity and change in progressive society," *id.* at 172. *Kring* (1882) and *Brantley* (1910) reached the Supreme Court at a time when the precepts of justice emanating from the Due Process Clause of the Fourteenth Amendment were rudimentary and insensitive to outrageous imperfections in the state criminal processes. To mention but two examples, it was not until the 1930's that a state conviction was invalidated under the Due Process Clause because it rested solely "upon confessions shown to have been extorted by officers of the State by brutality and violence," *Brown* v. *Mississippi,* 297 U. S. 278, 279 (1936), or because an accused in a capital case was denied the effective assistance of counsel, *Powell* v. *Alabama,* 287 U. S. 45 (1932); and it would be naive to suppose that in the seventy year period between the adoption of the Fourteenth Amendment and these decisions, no such defects existed or were complained of. *Kring* and *Brantley* arose during this lull in the Supreme Court's concern for constitutionally protected human rights, and, even if *Kring* and *Brantley* be read as declaring that this type of reprosecution is not so fundamentally unfair as to amount to a denial of due process of law, we would decline to follow them in applying

the fundamental fairness standard, not merely because of their half century antiquity, but because we would not be faithful to the evolution of our societal values if we reached any other conclusion.

New York was constitutionally forbidden to reprosecute Hetenyi for first degree murder following the completion of the first trial and to the extent that sections 464 and 544 of the N. Y. Code of Criminal Procedure authorize such a reprosecution, they are inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

III

The judgment of conviction under which Hetenyi is presently imprisoned was entered after a third trial. In the second trial he was found guilty of first degree murder and sentenced to death, but that judgment of conviction was reversed by the New York Court of Appeals. Neither this first reprosecution for first degree murder, nor the fact that it resulted in a conviction for that degree of murder, nor the fact that the conviction was successfully appealed by the accused removed the constitutional restrictions against reprosecuting him for first degree murder following the completion of the first trial. What was forbidden after the first trial remained so for the third trial, notwithstanding the intervention of the second trial and that appeal.

If the third trial had resulted in a verdict of guilty of first degree murder and Hetenyi were presently imprisoned under that conviction, and the legality of that detention were challenged by a habeas petition, the writ would surely be granted. To deny the State the authority to reprosecute him for first degree murder is to deny it the authority of convicting him of that charge, of "succeeding" in that reprosecution. Cf. *Ex parte Lange*, 85 U. S. (18 Wall.) 163

(1874). We cannot find any sense to the suggestion "that the issue of double jeopardy cannot be raised by a habeas corpus proceeding," *Barker* v. *Ohio*, 328 F. 2d 582, 585, *rehearing denied*, 330 F. 2d 594 (6 Cir. 1964). True, certain of the evils created by such reprosecutions, for example, the harassment and anxiety inflicted by the retrial itself, cannot be remedied by the habeas writ. But that would be true of any post-conviction relief, including direct appeal, which was employed by the Supreme Court in *Green* v. *United States*, to mention only one instance. This inadequacy of post-conviction relief is amply compensated by the fact that it can remedy some evils created by reprosecutions, such as the increased probability of obtaining a conviction by merely trying again, and it enables a court other than that which conducted the trial to vindicate and to protect the federal constitutional right.

However, unlike the accused in *Green* v. *United States*, Hetenyi does not stand convicted of first degree murder. On the third trial, the jury found him guilty of second degree murder, and, as another jury had done on the first trial, it remained silent on the first degree murder charge. The State was not denied the authority to reprosecute him for second degree murder following the completion of the first trial, and thus there may be a conceptual difficulty in maintaining it was denied the authority to convict him of that charge. Yet we believe that Hetenyi is being held in custody in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution because (1) there was a reasonable possibility that the conduct of the trial and the deliberations of the jury were affected by the fact that Hetenyi was indicted, prosecuted and charged with first degree murder and (2) the State was constitutionally forbidden to prosecute him for first degree murder following the completion of the first trial. Both the existence of this possibility of prejudice and the fact that it arises

from a violation of the accused's constitutional rights render the process which resulted in his detention constitutionally inadequate, less than that which is constitutionally due.

The question is not whether the accused was actually prejudiced, but whether there is *reasonable possibility* that he was prejudiced. *Fahy* v. *Connecticut*, 375 U. S. 85, 86-87 (1963) (illegally seized evidence); see also *Glasser* v. *United States*, 315 U. S. 60, 76 (1942) (denial of right to counsel); *Malinski* v. *New York*, 324 U. S. 401, 404 (1945) (coerced confession); *Payne* v. *Arkansas*, 356 U. S. 560, 568 (1958) (coerced confession); *Spano* v. *New York*, 360 U. S. 315, 324 (1959) (coerced confession); cf. *Lyons* v. *Oklahoma*, 322 U. S. 595, 597 n. 1 (1944) (dictum) (coerced confession). The ends of justice would not be served by requiring a factual determination that the accused was actually prejudiced in his third trial by being prosecuted for and charged with first degree murder, nor would the ends of justice be served by insisting upon a quantitative measurement of that prejudice. The energies and resources consumed by such inquiry would be staggering and the attainable level of certainty most unsatisfactory. There could never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the reprosecution or whether the accused's defense strategy was impaired by this scope of the charge, even if there were a most sensitive examination of the entire trial record and a more suspect and controversial inquest of the jurors still alive and available.

The District Court below declared: "Being in custody for the crime of murder in the Second Degree, . . . it appears that the procedure complained of has not resulted in any hardship to relator." It is doubtful whether this declaration could be viewed as a finding that the conduct of the trial or the deliberations of the jury could not rea-

sonably have been affected by the fact that the accused was indicted and was being prosecuted for first degree murder and that the jury was given the alternative of finding him guilty of that charge. The mere fact that the accused is in custody for second degree murder, the only reason offered by the District Court to justify its conclusion that "the procedure complained of has not resulted in any hardship to relator," is not sufficient to exclude this possibility, or to make it less than reasonable. However, even if the statement were read as such a finding, it would not be entitled to the slightest credulence. The District Court did not call for or examine the transcript of the third trial, nor conduct an evidentiary hearing, cf. *Townsend* v. *Sain*, 372 U. S. 293 (1963), nor engage in any other factual inquiries, and thus the usual reasons for deferring to the findings of fact of the lower court are entirely lacking.

We are also of the opinion that no legitimate interest would be served by remanding the case to a non-appellate court for a finding as to whether there is a reasonable possibility that the conduct of the trial or the deliberations of the jury were affected by the range of the prosecution and charge. The question as to whether there is a reasonable possibility of prejudice has traditionally been posed and resolved by the appellate courts, as the harmless error statute (28 U. S. C. § 2111) requires, at least in non-constitutional areas; and thus in this instance the accumulated experience to be drawn upon lies with appellate rather than trial judges. Moreover, in this instance, and on the elementary facts established—that the indictment of the third trial charged first degree murder, that the prosecution focused on obtaining a conviction on that charge, and that the jury was given the alternative of finding him guilty of that charge—we hold that there would be no rational basis for concluding that it is not reasonably

possible that the accused was prejudiced by the unconstitutionally broad scope of the prosecution.[27]

The sufficiency of the evidence would not by itself be such a rational basis. *Fahy* v. *Connecticut*, *supra*, 375 U. S. at 86-87. We would surely hesitate before assuming, or assigning to any other court the responsibility of determining, whether there is ample evidence to support the verdict in a criminal case, especially when that evidence linking the accused with the criminal act is entirely circumstantial. That responsibility would require examining every line of testimony and every exhibit, resolving in favor of the accused all conflicts in testimony, and drawing all the inferences urged by the accused—a task that is as subject to abuse as it is monumental. But even if that responsibility were assumed and faithfully discharged, and a court concluded that there was ample evidence to support the verdict finding Hetenyi guilty of second degree murder,[28] that court would not be justified in excluding the reasonable possibility that the accused was prejudiced by the unconstitutionally broad scope of the prosecution. The mere fact that Hetenyi *could* have—logically and legally—been convicted of second degree murder on the basis of all the evidence, does not mean that he *would*

---

[27] See, by way of illustration, *State* v. *Ross*, 29 Mo. 32 (1859); *State* v. *Tweedy*, 11 Iowa 350, 357-58 (1860); *State* v. *Dennison*, 31 La. Ann. 847, 849 (1879); *West* v. *State*, 55 Fla. 200, 46 So. 93 (1908); *People* v. *Gessinger*, 238 Mich. 625, 628-29, 214 N. W. 184, 185 (1927), reaching similar results under state law. But compare, *Slaughter* v. *State*, 25 Tenn. (6 Humph.) 410 (1846) and *State* v. *Belden*, 33 Wisc. 120 (1873).

[28] On direct appeal from the judgment of conviction entered in the third trial, the Appellate Division declared, without any elaboration, that the verdict "is amply supported by the evidence," see *supra*, p. 2650. It should be noted that under New York standards, even if the evidence is sufficient to support the verdict an error could nevertheless be prejudicial and thus require reversal, see the appeal from the judgment of conviction entered on the first trial, *supra*, p. 2647.

have been so convicted if he were not also charged with first degree murder. For example, it is entirely possible that without the inclusion of the first degree murder charge, the jury, reflecting a not unfamiliar desire to compromise might have returned a guilty verdict on the first degree manslaughter charge on the same evidence. There is, of course, no basis for predicting, with any confidence, that this would have been the outcome of the third trial if Hetenyi had not been reprosecuted for first degree murder; but neither is there any basis for predicting, with any confidence, that this would not have been the outcome. To make this latter prediction on the basis of the sufficiency of the evidence would be to ignore reality and, in effect, to have judges make the choice entrusted to the jury.

Nor do we find section 30 of the N. Y. Penal Law to be a sufficient basis for excluding the possibility of prejudice. It provides: "Whenever a crime is distinguished into degrees, the jury, if they convict the prisoner, must find the degree of the crime of which he is guilty." Just as it is unrealistic to maintain that the first jury's silence on the first degree murder charge admits of only one possible explanation, that the jury unanimously believed the state had failed to prove all the elements of the charge beyond a reasonable doubt, see *supra* pp. 2267-69, it would be unrealistic to maintain that the third jury's verdict of guilty of second degree murder admits of only one explanation, that the jury unanimously believed the state failed to prove all the elements of first degree murder beyond a reasonable doubt, although it unanimously believed, without giving any consideration to the fact that the accused was also charged with first degree murder, that the state had proved the elements of second degree murder beyond a reasonable doubt. Cf. *Jackson* v. *Denno*, 378 U. S. 368 (1964). The point is not that the other explanations are more probable, but merely that they are possible and that they are within

the realm of reason rather than fantasy. Although some of the other explanations, such as the jury compromising its verdict, depend on the jury having disobeyed certain commands of state law, this does not mean that they are not reasonably possible. Nor is there any reason not to preserve the accused's opportunity to reap one of the benefits of a new trial (absent the first degree murder charge) that might only be bestowed if the next jury disobeys state law and compromises its verdict. The opportunity to obtain such a benefit is a necessary incident to the accused's right to trial by jury and it would indeed be ironical, not to mention unfair, if the accused were deprived of that opportunity because the state violated his constitutional rights by reprosecuting him in these circumstances for first degree murder.

We are not suggesting that whenever the range of the prosecution is improperly broad or a greater charge is improperly submitted to the jury the trial is rendered constitutionally inadequate. We have no occasion to consider that more far-reaching question, for here the impropriety consisted of a violation of a federal constitutional mandate. The breadth of the prosecution and the submission to jury of the first degree murder charge were improper because they violated Hetenyi's constitutional right not to be reprosecuted for first degree murder following the completion of the first trial; his constitutional right was violated regardless of whether the reprosecution resulted in an acquittal or conviction for that crime. See *supra*, pp. 2669-70. The source of the impropriety does not increase the possibility of prejudice, nor does it alter the ways in which the error could work to the prejudice of the accused. See *Fahy* v. *Connecticut*, *supra*, 375 U. S. at 95 (dissenting opinion). Instead, its significance is derived from our understanding that an accused is not afforded due process of law when his federal constitutional rights have been violated and the conduct which violated his constitutional

rights created a reasonable possibility of prejudicing the accused. This understanding reflects the view that an individual's federal constitutional rights are among those that are most fundamental and it enables a federal court to vindicate and protect those rights. The concept of "due process of law" embodied in the Fourteenth Amendment then not only imposes substantive limitations on the power of the states to reprosecute an individual for the same crime; it also entitles an accused, as a condition of depriving him of his liberty, to a trial where there is no reasonable possibility that violation of his constitutional rights has worked to his prejudice.

We therefore hold: I. The Due Process Clause of the Fourteenth Amendment imposes some limitations on the power of the states to reprosecute an individual for the same crime. II. New York transgressed these limitations by reprosecuting Hetenyi for first degree murder following the completion of the first trial, notwithstanding Hetenyi's successful appeal of the second degree murder conviction obtained in that trial. III. There is a reasonable possibility that Hetenyi was prejudiced in his third trial by the fact that he was indicted, prosecuted and charged with first degree murder; and both this possibility of prejudice and the fact that it was created by conduct that violated the accused's constitutional rights rendered this trial constitutionally inadequate. Hetenyi has been deprived of his liberty without due process of law, and therefore he is being held in custody in violation of the Constitution. The order below denying Hetenyi's application for the writ of habeas corpus is reversed, with instructions that the writ be granted unless, within a reasonable time, New York affords Hetenyi a new trial that conforms to the principles set forth in this opinion.

Assigned counsel for relator on this appeal, Ernest J. Brown, Esq., of Cambridge, Massachusetts, represented

his client with eloquence and perception, and we are indeed grateful.

Reversed.

METZNER, *District Judge* (dissenting):

The question presented here is whether the guarantee contained in the Fifth Amendment against double jeopardy should be absorbed by the Fourteenth Amendment so as to make it applicable to state prosecutions. If the answer be yes, then the full scope of that guarantee as interpreted by the federal courts is applicable to the states. *Malloy* v. *Hogan*, 378 U. S. 1, 10 (1964).

Many state prosecutions have been challenged in the Supreme Court as violative of the guarantee against double jeopardy, but in none of these has the plea been sustained. These cases are all referred to in the majority opinion.

The leading authority on the subject is *Palko* v. *Connecticut*, 302 U. S. 319 (1937). *Palko* presented a much stronger factual case for a determination contrary to the one reached by the Court than is presented here. Palko had been convicted of the crime of murder in the second degree on an indictment charging murder in the first degree. A sentence of life imprisonment was imposed. After reversal Palko was retried and convicted of murder in the first degree and sentenced to death. The clear refusal by the Court to find an invasion of Palko's guarantee against double jeopardy, as provided by the Fifth Amendment, allowed the death penalty to stand.

Hetenyi claims that he should have been retried only on a charge of second degree murder. The first retrial resulted in a verdict of guilty of murder in the first degree, but upon reversal and a second retrial he was found guilty of second degree murder, for which crime he is now incarcerated.

It may well be that, in view of the recent decisions of the Court (*Mapp* v. *Ohio*, 367 U. S. 643 (1961), search and

seizure; *Robinson* v. *California*, 370 U. S. 660 (1962), cruel and unusual punishment; *Gideon* v. *Wainright*, 372 U. S. 335 (1963), right to counsel; *Malloy* v. *Hogan*, *supra*, self-incrimination; *Pointer* v. *Texas*, 380 U. S. 400 (1965), right to confrontation), either the test enunciated in *Palko* or the holding of constitutionality of the Connecticut statute involved therein will be overruled. *But see* the concurring opinions of Mr. Justice Harlan and Mr. Justice Goldberg in *Pointer* v. *Texas*, *supra*. However, the incorporation of guarantees of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment at the expense of departing from several long-standing Supreme Court decisions is a step which should only be taken by that Court.

The order should be affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel. GEORGE HETENYI,

Relator-Appellant,

v.

WALTER H. WILKINS, Warden of Attica State Prison, Attica, New York,

Respondent-Appellee.

PETITION FOR REHEARING

Petition for rehearing denied.

J.J.S.
U.S.C.J.J.

C.M.M.
U.S.D.J.

Judge Marshall voted to deny the petition for rehearing, but has become Solicitor General of the United States prior to the filing of the ruling denying the petition.

2 December 1965

Appendix C.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. GEORGE HETENYI,

Relator-Appellant,

v.

WALTER H. WILKINS, Warden of Attica State Prison, Attica, New York,

Respondent-Appellee.

PETITION FOR REHEARING IN BANC

Before Lumbard, Chief Judge, Waterman, Moore, Friendly, Smith, Kaufman, Hays and Anderson, Circuit Judges.

The petition of the respondent for rehearing in banc is denied. Chief Judge Lumbard, Judge Moore and Judge Hays dissent and vote to grant the petition.

J. EDWARD LUMBARD
Chief Judge

2 December 1965